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PENNSYLVANIA
STATE REPORTS.

VOL. 259

CONTAINING

CASES DECIDED

BY THE

Supreme Court of Pennsylvania,

MAY AND OCTOBER TERMS 1917, AND
JANUARY TERM, 1918

REPORTED BY

WILLIAM I. SCHAFFER,

STATE REPORTER.

THE GEO. T. BISEL CO.,
PHILADELPHIA,
1918.

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JUL 6 1918

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA

Kicinko et al. v. Petruska et al., Appellants.

*Church law—Church property—Dedication to certain purposes—
Diversion—Equity—Injunction—Judgment in prior suit—Res ad-
judicata—Estoppel.*

1. The estoppel of a judgment extends only to a question directly involved in the issue and not to any incidental or collateral matter however it may have arisen and been passed upon.

2. A decree in equity determining the right of a congregation to discharge a rector, under a contract which he had violated, does not bar a subsequent suit between members of the same congregation relating to the control of the church property, and it is not material that certain findings in the prior suit are not consistent with certain findings in the second suit, where the questions involved in such findings were merely incidental to the main questions at issue.

3. A congregation was incorporated in 1901 for the purpose of maintaining a place of worship according to the faith, doctrine, discipline, government and forms of the United Greek Catholic Church. Until 1914 the congregation adhered to the faith and practiced the ritual of the United Greek Catholic Church. In 1914 the congregation employed a priest who belonged to the Orthodox Greek Catholic Church and who began to preach the dogmas and perform the ceremonies of such denomination, so that a large number of the members forsook the charter purposes of the congregation, and practiced in the church the worship and forms of the Orthodox Greek Catholic Church, excluding from the church premises those who adhered to the United Greek Catholic

Church. A suit had been brought against this Greek Catholic Church and prosecuted to judgment, involving the right of the congregation to discharge its priest for violation of contract. In a suit in equity brought by the members of the congregation who adhered to the United Greek Catholic Church to enjoin the members in control from using the church property for the practice of the worship and forms of the Orthodox Greek Catholic Church, the lower court decided that the property had been acquired for the purpose of practicing the worship and forms of the United Greek Catholic Church and that it was impressed with a trust for that purpose; that the prior suit was not *res adjudicata*; and awarded the relief prayed for. *Held*, no error.

Equity practice — Adjudications — Exceptions — Chancellor and other judges—Opinion—Appeals.

4. Where a court consists of more than one judge, exceptions to an adjudication must be heard by the other members of the tribunal, in addition to the chancellor who tried the case, unless this course is made impossible by their physical disability or equally potent reasons, and the final disposition of the exceptions should be accompanied by a written opinion from the court in banc whenever the circumstances so require; and in the absence of such opinion the record will be returned by the appellate court for a written opinion by the court below.

Argued May 1, 1917. Appeal, No. 146, Oct. T., 1916, by defendants, from decree of C. P. Westmoreland Co., Equity Docket, No. 894, awarding an injunction, in case of John Kicinko, John Martin, John Mikulaninitz, Hritz Fendya, Vasil Svreda, Mike Panco, George Juhas, Paulina Skirpan, Joe Ory, Petro Dankanich, Paul Chertišky, John Fecko, Andy Miklovs, Vasil Valenter, Vasil Hardoby, Andy Halko, Joe Hulick, Vasil Sandala, George Hertnick, Vasil Lucanick, Andy Kocan, George Shuma, Jr., and Rev. Paul Ruttkay, members and Pastor of the Greek Catholic Church of the Assumption of the Blessed Virgin Mary; and the Greek Catholic Church of the Assumption of the Blessed Virgin Mary—John Kicenko, John Martin, John Mikulaninitz, Hritz Fendya, Vasil Svreda, Petro Dankanich, and John Fecko, Trustees, v. John Petruska, Mike Kohut, Nik Kerestan, Mike Shurkay, George Shuma, Pet Ratica and George Mike,

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and Rev. V. Levkanich, members and Pastor of the Russian Orthodox Greek Catholic St. Mary's Church; and the Russian Orthodox Greek Catholic St. Mary's Church—John Petruska, Mike Kohut, Nik Kerestan, Mike Skurkay, George Shuma and George Mika, officers. Before BROWN, C. J., MESTREZAT, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Bill in equity for an injunction. Before DOTY, P. J., COPELAND, P. J., specially presiding, and MCCONNELL, J.

The opinion of the Supreme Court states the facts.

The court on final hearing awarded an injunction as prayed for. Defendants appealed.

Errors assigned were in dismissing exceptions to various findings of fact and law and the decree of the court.

Lewis C. Walkinshaw, with him *Hugh W. Walkinshaw*, for appellants.

Adam M. Wyant and *Gregory I. Zsatkovich*, with them *Edward E. Robbins*, for appellees.

OPINION BY MR. JUSTICE MOSCHZISKER, June 30, 1917:

This case arose out of religious differences existing between two factions of a church congregation; after an elaborate trial, the plaintiffs succeeded in obtaining an injunction against the defendants, as hereinafter more fully set forth; the latter have appealed.

The record is a long one; but the material features of the controversy may be stated with comparative briefness. The church in question was organized in 1901, in Monessen, and two years thereafter the congregation was incorporated under the name of the "Greek Catholic Church of the Assumption of the Blessed Virgin Mary," the charter stating: "The purpose for which the corporation is organized is the support and maintenance of a place for the worship of Almighty God in accordance to the faith, doctrine, discipline, government and forms of

the United Greek Catholic Church, as are now in force and effect and held, or may hereafter be passed and adopted by the governing or law-making power of said church, which it hereby accedes to, recognizes and adopts." From the date of its organization to 1914, when a priest named Levkanich came to the congregation, the members thereof adhered to the faith and practiced the ritual of the "United Greek Catholic Church," or "Uniate Greek Catholic Church," or "Uniat Greek Catholic Church," which title signifies an ecclesiastical body in union with the Roman Catholic Church and acknowledging the primacy and supremacy of the pope; and they did not believe in the teachings or follow the ritual of the "Orthodox Greek Catholic Church," or "Orthodox Catholic Church," which title is used to designate Catholic churches that refuse allegiance or obedience to the pope, looking to the czar of Russia as their ecclesiastical head and denying many of the fundamental doctrines of the Roman Catholic Church. Father Levkanich was an ordained priest of the "Orthodox" church, and shortly after his arrival in Monessen he began to preach the dogmas and perform the ceremonies of that denomination, with the result that a considerable number of parishioners forsook the charter purposes of the congregation; and, in the end, the orthodox persons took control, refusing those adhering to the original faith admission to the church premises. The property in question was built through the expenditure of money collected with the avowed intent of purchasing a lot and erecting thereon an edifice to be used "for the worship of Almighty God according to the faith, doctrine, discipline, government and rights, usages, customs, forms and beliefs of the United Greek Catholic Church." The chancellor found, inter alia, not only the foregoing facts, but also "that Rev. V. Levkanich was the guiding spirit in the attempt to divert this property to other uses than that for which it was dedicated, and to change its form of worship, doctrine, discipline, and government; and that this was

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done with the approval, knowledge and consent of..... his followers in the congregation."

On the facts just stated, and upon other but subordinate findings, the court below decreed defendants be enjoined and restrained from preaching, teaching or holding any religious services in the before-mentioned church property and from diverting the same "to any form of public worship other than that prescribed in its charter and followed by the congregation from the date of its organization"; also, Father Levkanich and others of the defendants were ordered to deliver up the keys of the church property to the present officers of the congregation, the latter being named in the decree, and the defendants were ordered to permit the rector, or priest, "trustees and members of the Greek Catholic Church of the Assumption of the Blessed Virgin Mary to enter said church and hold services therein," meaning thereby the priest and trustees chosen by the members who had adhered to the faith and followed the ritual designated in the church charter. This is the decree complained of.

We have examined the whole of the printed testimony, paying particular heed to the parts relied upon by appellants, but are not convinced of manifest error in any finding of fact; and, on the findings as made, the conclusions of the learned court below are inevitable.

As correctly stated by President Judge DORY, in his concurring opinion, "This congregation.....is self-governing in temporal affairs, electing its own trustees and holding title to the property in the names of the trustees or of the congregation, which practice was initiated by said congregation and acquiesced in by the [Roman Catholic] bishop of the diocese.....Whether the church was wholly independent is not the decisive question. The real, important matter is whether the defendants, now in possession and control of the church property, had departed from the faith of the founders and changed certain forms, fundamentals and practices

of the church. This church was chartered....., and the purpose set forth in the articles of association is as follows: 'The purpose for which the corporation is organized is the support and maintenance of a place of worship of Almighty God in accordance to the faith, doctrine, discipline, government and forms of the United Greek Catholic Church, as are now in force and effect, and held or may hereafter be passed and adopted by the governing or law-making power of said church which it hereby accedes to, recognizes and adopts.' The church, of course, could be independent and yet adopt fully the faith, doctrine, and practices of the United Greek Catholic Church; it appears that.....such religious rites have been observed in the Monessen church since its organization until.....the Rev. V. Levkanich was chosen pastor....., that the Rev. V. Levkanich, with the other [defendants].....has abolished in this church the worship of Almighty God according to the faith.....and beliefs of the United Greek Catholic Church....., and that various changes were introduced,.....some fundamental doctrines repudiated and certain practices to which the congregation were accustomed from its inception were abolished..... The defendants cannot introduce such vital changes in forms and fundamental doctrine and at the same time assert the right of possession and control of the [church] property." While the facts in none of the cases we are about to cite are precisely like those at bar, yet the material principles laid down and discussed in these authorities are relevant and controlling; and they fully sustain the view of the law stated in the excerpt just quoted from the opinion of the learned president judge of the court below: See Schnorr's App., 67 Pa. 138; Roshi's App., 69 Pa. 462; Sarver & Others' App., 81½ Pa. 183; Greek Catholic Church v. Orthodox Greek Church, 195 Pa. 425; Mazaika v. Grauczunas, 229 Pa. 47, 53.

The contention of defendants that, upon the doctrine

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of *res adjudicata*, the decision in *Berecz et al. v. Greek Catholic Church et al.*, 3 Westmoreland L. J. 151, controls the present case, cannot be sustained. As said by Judge DOTY, in his concurring opinion at bar, "The two cases are not conflicting, and the *Berecz* case is not conclusive here; an examination of that case will show the issue [there involved] is not the one now presented." Albeit *Berecz v. Greek Catholic Church* concerned the same congregation with which we are now dealing and certain findings there may seem to be out of harmony with some of those at bar, yet these apparent inconsistencies are not substantial. In other words, the alleged differences involve matters which were in no sense controlling in the *Berecz* case, the real point there in controversy being the right of the congregation to discharge the then present complainant, who had been employed by the former as its priest under a contract which he had violated. "It is too well settled, to need either argument or authority to maintain it, that the estoppel of a judgment extends only to the question directly involved in the issue and not to any incidental or collateral matter, however it may have arisen and been passed upon": *Lewis & Nelson's Appeal*, 67 Pa. 153, 165. Here, there is no question as to the congregation's power to employ and discharge its priest, nor of the former's right to control the church property and manage its own temporal affairs; and the authorities cited to sustain the decree entered by the court below are not in conflict with the decisions of this court relied on by appellants; none of the latter the facts at bar. As to the cases cited from other jurisdictions, it is sufficient to say, we have enough of these church controversies adjudicated in our own State not to require light upon the subject from without.

When the present appeal first came before us, the defendants made it appear as though there was a substantial conflict between the adjudication in the *Berecz* case and the one at bar; and, since we then had no

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opinion from the court in banc, it seemed as though two chancellors sitting in the same tribunal had made materially different and conflicting decisions concerning a like matter. Hence, we returned the record for a written opinion from the court in banc, under our well established rule in equity that, where a court consists of more than one judge, exceptions to an adjudication must be heard by other members of the tribunal in addition to the chancellor who tried the case, unless this course is made impossible by their physical disability or equally potent reasons; and the final disposition of the exceptions should be accompanied by a written opinion from the court in banc, whenever the circumstances so require (as they clearly do in the present instance). See *Myers v. Consumers' Coal Co.*, 212 Pa. 193, 200-1; *Id.*, 228 Pa. 444; *Ebling v. Schuylkill Haven Borough*, 244 Pa. 505, 511-12; *Thomas v. Her-ring*, 244 Pa. 550, 558-9.

We have not attempted to discuss in detail all of the fifty-three assignments; but we have examined each of them, and find no reversible error.

The decree is affirmed at the cost of the appellants.

Drake et al., Executors, v. Berry, Trustee, et al.

Mines and mining—Coal leases—Accounting—Construction—Forfeiture.

1. "Miners' weight" as used in a coal lease is not a fixed, unvarying quantity of mine run material, but is such quantity of the same as operators and miners may from time to time agree as being necessary or sufficient to produce a ton of prepared coal.

2. Where a coal lease provided "miners' weight to be the standard" of each ton of coal mined, and thereafter the successors in title of the lessors brought a bill in equity against the lessees for an accounting for coal mined, the court properly decided that the accounting should be on the basis of the miners' weight fixed upon by the operators and miners during the accounting period, not

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upon the basis of the miners' weight as it existed at the time of the execution of the lease.

Drake et al. v. Lacoe et al., 157 Pa. 17, followed.

3. In such case, a provision in the lease "that sufficient pillars of coal shall be left to support the roof over the gangways and the usual protection of the mines generally," was for the protection of the colliery, not of the surface, and the successors of the lessors, though owning the surface, were not entitled to an injunction to restrain the removal of coal from the pillars, especially after all reason to apprehend surface disturbance by the removal of such coal had ceased to exist.

4. In such case a usage that the owner of the surface was entitled to one-third of all the pillar coal, could not be set up to defeat a grant of all the coal in the mine, and the successor of the lessor was not entitled to restrain the removal of such coal or to have a forfeiture of the lease declared because of such removal.

Argued April 12, 1917. Appeals, Nos. 25 and 50, Jan. T., 1917, by plaintiffs and defendants, from decree of C. P. Lackawanna Co., May T., 1912, No. 3, in equity, on bill in equity for an accounting, in case of George Drake, Executor, Sarah E. Drake and Caroline E. Stewart, Executrices of the Last Will and Testament of George K. Drake, dec'd., v. John W. Berry, Trustee, R. D. Lacoe and Margaret Lacoe White, Heirs and Administrators of the Estate of R. D. Lacoe, Deceased, and Frank S. Shiffer, Surviving Executor of the Last Will and Testament, and William A. Shiffer, Frank E. Shiffer, and Gertrude Healey, Heirs of J. B. Shiffer, Deceased, Joseph J. Jermyn, Surviving Partner of John Jermyn and Joseph J. J. Jermyn, Copartners Trading as Jermyn & Co., James L. Morris and E. W. Mulligan, Executors of the Last Will and Testament of M. W. Morris, Deceased, Huldah A. Drake, Ebenezer Drake and Thos. Drake. Before BROWN, C. J., MESTREZAT, POTTER, FRAZER and WALLING, JJ. Affirmed.

Bill in equity for an accounting.

The principal relief asked for in the bill was for an accounting for coal royalties payable to plaintiffs under

Statement of Facts—Opinion of Court below. [259 Pa. two coal leases, executed in 1863 and 1865. The main question was the tonnage basis upon which the royalties are to be paid. In addition to the prayer for an accounting, a decree was asked for declaring the leases to be forfeited and for an injunction restraining the defendants from mining and taking coal away from the leased premises. The trial judge, NEWCOMB, J., found as follows:

CONCLUSIONS OF FACT.

1. The bill was filed April 6, 1912, by George K. Drake, now deceased, who sued in his rights as successor in title upon the death of his father, Charles Drake, called the lessor in the instruments hereinafter mentioned. He had succeeded, however, as one of four brothers who became equal tenants in common. His cotenants, not joining in the bill, are for technical reasons made parties defendant. After the death of the original plaintiff substitution was made as appears by the above caption.

The firm of Jermyn & Company, by its surviving partner, is a sublessee. The other defendants represent the interest of the lessees next hereinafter mentioned.

2. The subject-matter is the amount of royalty bearing coal mined from several veins underlying a tract of seventy odd acres of land in what is now Old Forge Township, this county, of which Drake, the lessor, was owner in fee. In 1863 and 1865, respectively, he made two indentures under seal, commonly called "Coal Leases." The one granted to R. D. Lacoe and J. B. Shiffer—both now dead—their heirs, assigns, etc., all the coal in the tract, excepting the upper or Marcy vein; the other granted to the Massachusetts Coal Company, its successors and assigns, all the coal so excepted. The first was for a term of ten years and such further time as lessees should continue to pay the royalty, subject to forfeiture for default of payment for the period of six months. A yearly minimum of \$500 was to be paid in half yearly installments on the 1st of April and October, collectible

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at lessor's option by distraint. In consideration thereof lessees were to have the right to mine and carry away 5,000 tons of coal yearly at ten cents a ton "miners' weight to be the standard." The same price was to be paid for all coal mined in excess of the minimum which was to be paid whether mined or not, subject, in case of deficit in mining or payment in any one year, to have credit for any excess thereof in any preceding year, with the privilege of making up in any subsequent year such deficit of coal as may have been paid for though not mined in any preceding year. The lease conferred the usual mining rights for purpose of shafts and other structures, with the use of so much surface as might be deemed necessary or expedient, inter alia, for roads and wasting grounds. There was a covenant for workmanlike mining and that "sufficient pillars of coal shall be left to support the roof over the gangways and the usual protection of the mines generally."

3. While the second lease passed all the coal in the Marcy, the obligation to mine was limited to the "merchantable coal," the exhaustion of which was the only thing to define the term. There was no minimum but the royalty was ten cents a ton "miners' weight on all the merchantable coal mined from said vein," etc., payable semiannually. Lessee was to have the right of way over or under the demised premises after the expiration of the term for the conveyance of coal taken from the corresponding vein on an adjoining tract. It was further stipulated that the lease was "subject to the provision of" the Lacoe and Shiffer lease "so far as relates to its continuance, the payment of taxes and the inspection of books as well as the conduct of mining operations in a workmanlike manner." In addition to the royalty, it called for the annual delivery to Drake or his successors of "fifty tons of lump or prepared coal" so long as lessee's rights in the premises should continue to be exercised. The lease changed hands and eventually became vested in Lacoe and Shiffer, who thus acquired the leasehold in

both parcels of coal. They died, seized of that estate in both, and it is now in their personal representatives. But during all the time for which accounting is asked, the mining has been done by Jermyn & Company under their sublease of April 1, 1887, copy of which is set forth as Exhibit One in their separate answer. The fact is noted that parties to this instrument defined as "merchantable coal" everything above the size known as pea, but stipulated for a given royalty on all sizes including pea as well as still smaller sizes. The books and accounts of production in evidence are those of Jermyn & Company.

4. The lessor died in 1873 and was succeeded in title by his four sons. One of these was George K., original plaintiff here. Another was Lyman K., who sold and transferred his share to Mr. Lacoe, one of the lessees. In that state of the title the parties in interest, by writing 18th February, 1880, modified the provisions of the leases so as to subject the tract, both surface and subsurface, to certain uses for the benefit of mining operations on an adjoining tract so long as might be needed, regardless of the expiration of the terms of the leaseholds unless ended by forfeiture. The only other modification had to do with furnishing the fifty tons of coal. This was changed by apportioning the amount equally between the parties entitled, specifying the place where delivery was to be made on demand, and providing that the right to demand it should be exercised each year. For the contents of these several writings reference is made to copies exhibited in the bill as A, B and C, respectively.

5. Up to that time no mining of consequence had been done under the earlier lease, though the minimum royalty had been regularly paid. Later there was an unsuccessful attempt by lessees to apply these payments on account of the mining which had been done in the Marcy vein under the second lease. This brought on a bill for accounting in 1888. The operations for which accounting is now demanded go back to 1891 in the Marcy, and

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to 1899 in the lower veins governed by the earlier lease. Back of 1891 there had been no mining except in the Marcy and it is drawn in question only incidentally in connection with defendant's claim that the royalty unit is *res adjudicata* by force and effect of the decree of October 2, 1893, in the former suit. See *Drake v. Lacoe et al.*, 157 Pa. 17.

6. The meaning of the "miners' weight" as used in the lease of 1863 is the key to the question in dispute. If, as contended by defendants, it is the equivalent of a ton of "prepared sizes" of coal ready for shipment to market, then admittedly there was nothing to account for on that score when suit was brought, as payment had been either made or tendered in full of all that defendants were bound to pay by the terms of the contract. Indeed, in that case they have overpaid. The term "prepared sizes" or "prepared coal" includes nothing below chestnut; so it is not disputed that if the language of this lease was effective to limit the royalty to prepared sizes of coal, the pea, buckwheat and other so-called steam sizes would go free. On the other hand it is equally undisputed that in case of the Marcy the lessees paid on all sizes without question until a comparatively recent date. They now deny liability for anything below chestnut plus an allowance for loss in tonnage of prepared sizes due to breaking the coal down in order to supply the market demand of later years for chestnut and smaller sizes. To cover their estimate of the value of plaintiff's equity arising in that way they now include in their tender the royalty on 52 21/100 per cent. of the pea which goes to market, and claim entire exemption only for sizes below that.

7. This view seems to have originated since 1900, or soon after active operations began under the 1863 lease. It is candidly admitted by Mr. Berry to have been due to the outcome of the "Warrior Run Case," i. e. *Wright v. Coal Co.*, 182 Pa. 514, which was decided in 1897. It could hardly have been entertained before 1900, as a payment relied upon to settle a large part of the claim for mining

in the Marcy was made October 25th, that year. This is evidenced by a voucher made out by defendants covering in detail the total yield from 1891 to April, 1897, when the operation in this vein was discontinued in the belief that it was exhausted. Thus they paid on the marketable product at that time. While the same is true of the earlier payment to satisfy the decree in *Drake v. Lacoe et al.*, supra, covering the antecedent mining in that vein, it is also true that it included nothing below chestnut as that was the smallest size going to market during the period involved in that accounting, which was from 1871 to 1876. Hence, there was no specific occasion to claim immunity as regards smaller marketable sizes in that instance. But not so in respect to the payment of 1900 for the operations between 1891 and 1897, as at that time it is not disputed that both pea and buckwheat were marketed, and that both were voluntarily accounted for in that settlement.

8. The voucher of 1900 appears by copy as defendant's Exhibit A in the separate answer on part of lessees, and also as their Exhibit No. 1 in the proofs, to which reference is made for its contents. The fact is here noted that plaintiffs seek to avoid its prima facie effect on the allegation that it was executed and delivered by their testator on the faith of an oral understanding that it didn't mean what it says, but only a payment on account which could be accepted without prejudice. It is also noted that the parties have at all times treated the half yearly payments under the lease for this vein as falling due the first of April and October as in case of the earlier lease.

9. Later, more coal being found in the Marcy, mining was resumed there in 1910 in connection with that being carried on in the lower veins. Before the end of March, 1914, the new operation was complete and the vein finally abandoned. No separate account of the shipments from this source was kept during that period and the marketable tonnage can only be calculated from the

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quantity which came to the breaker in the mine cars, as to which a record was kept of the total number. But this involves some dispute as to the average weight of the car content. Plaintiffs say it was 7,099, and defendants 5,732 pounds.

10. By mutual consent of the parties Mr. George E. Stevenson, a competent engineer, was designated by the court to make an independent test of the weights. Upon what is believed to have been a fair and adequate test he makes the average 6,641 pounds per car. That is somewhere near midway between the opposing figures of the parties and is the figure adopted in view of the conclusion founded upon the testimony of Mr. Corcoran, general manager of the Jermyn & Company operation since its inception, that the weights have at all times been substantially uniform. The number of cars from this vein during the years in question was 33,270, making a gross tonnage of 99,229.08 going into the breaker. There is no reason to believe there was any falling off in percentage of yield as compared with that of 1896-7, the last year for which a separate account had been kept, when it was 71 9/10 (71 9/10%); and that is adopted as the percentage applicable to the years 1909 to 1914. This would make a marketable tonnage of 70,719.75 tons for that period; and the fact is accordingly so found. If the royalty is payable on that basis it would amount to \$7,091.98, of which plaintiffs' share would be \$1,773. The yearly production appears by computation shown in blueprint hereto attached and marked B, to which reference is made for the half yearly amounts with interest thereon to October 1, 1915, of \$423.30, a total of \$2,196.30.

11. This calculation takes into account neither the fuel coal used by the operator, nor plaintiffs' claim for pillar coal based on the contention that under the terms of the contract in the light of an alleged usage of the industry at an early day, the lessor was entitled to have approximately one-third of the coal left in place as pil-

lars for support of the surface; and, none being so left, to that extent the mining was wrongful. Hence, the claim that pro tanto defendants should account for the value of the coal in place. While the quantity from that source may be susceptible of calculation from certain data in evidence, for reasons hereinafter stated it has not been calculated.

(Lower veins—1863 lease.)

12. In the veins below the Marcy the mining began in the fall of 1899 and is still in progress. The minimum was accepted regularly until March 31, 1905, inclusive. From that time ever since it has been refused because of the dispute culminating in the present suit. No report of the tonnage was made until 1911, apparently because it was then for the first time formally demanded. The omission to report on the one side, and to make demand on the other, had been due to the fact that the minimum for years gone by had amounted to enough to cover the mining for some years after actual operations began. On defendant's theory the advance minimum became exhausted on March 31, 1913. There having been no tonnage to account for before 1900 as in case of the Marcy, there has been no period of the mining under this lease when the parties settled with each other on the basis of the marketable tonnage. But in addition to the minimum falling due since April 1, 1905, defendants have tendered a further sum to cover plaintiffs' share of the excess payable on their present theory of liability for prepared sizes and a percentage of the pea.

13. According to the usage prevailing in this region in 1863 the term "miners' weight" meant the gross ton plus 10%, or 2,464 pounds in the mine car. It was afterwards increased so that while it varied somewhat as between different sections of this valley, at Old Forge and vicinity since the early '70s it has been 3,024 pounds. In either case it was the weight of mine-run material that the miner must produce in order to get paid for mining a ton of coal, the excess being a more or less arbitrary al-

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lowance against him for refuse and waste in the mine car content.

Defendants claim that instead of a fixed quantity, the term was defined in *Drake v. Shiffer*, *supra*, to mean such amount of material in the mine car as should from time to time be agreed upon, not by the parties but, by and between operator and miner as sufficient to yield a ton of prepared coal after passing through the breaker; and as such would be an indefinite and variable quantity depending upon the character of the vein material for the time being, so that by a sort of circumlocution it amounted to an agreement for ten cents a ton on "prepared sizes" only. If that be so, they are in no default for the reason already stated.

It may be added that for the purpose of keeping their tender good it was maintained at bar by paying into court for plaintiffs' use the sum of \$5,725.29 sec. reg.

14. Plaintiffs demand an accounting at ten cents a ton of 2,464 pounds in the mine car before the coal went into the breaker. This quantity can now be determined only by the same method of calculation mentioned in case of the *Marcy*. (See 9th conclusion above.) The number of cars appears by the operator's books. At the same average weight the total to October 1, 1915, would be 549,047 mine tons if the ton be taken at 2,464 pounds. At 3,024 pounds for that factor it would be 447,385 tons.

This date is adopted as limiting the period to be accounted for because it was the latest date to which the calculation could be carried at the time when the issue went to trial.

15. It follows that on this basis one-fourth of the royalty to that date would be either \$13,726.18 or \$11,184.63 according as the lower or higher unit should be taken as the "miners' weight." In either case the figure would be subject to a credit of \$5,125 by reason of the minimum payments accepted by plaintiffs or their testator. In the one case the royalty would be covered down to April 1, 1906, and in the other to October 1, 1907. One of these

would therefore become the interest date if lessees are accountable on either basis. The result is that in the one case the royalties with accrued interest would amount to \$10,639.97; and on the other to \$7,227.54 on October 1, 1915, as shown by detailed computation in blueprints hereto attached, marked respectively A1 and A2.

16. Associated with the question of pillar coal, mentioned in the eleventh Conclusion, is that of damages for surface subsidence occasioned by mining out the pillars. None were left in either the Marcy or the Clark vein next below, in both of which the mining has been completed. Defendants intend to mine the lower veins to the same extent, but no further injury is apprehended from that source. That there has been some disturbance of the surface is not denied, and lessees admit their liability on that score as well as the jurisdiction of equity to take account of the damages in this proceeding. The dispute is as to the nature and extent of the injury and its amount in dollars and cents, as to which the difference is marked. Title to something like forty-five acres of surface remains in lessors' estate. It is believed, and accordingly found, that the subsidence is now complete and that it affects not to exceed three acres of which the value before the injury was not more than \$900; and that the depreciation by reason of the injury does not exceed \$500. The legal injury was complete upwards of three years ago.

The requests for specific findings of fact not substantially covered by the foregoing are disposed of as follows:

PLAINTIFFS' REQUESTS.

13. Payments of minimum royalty on the lease of November 28, 1863, were accepted from 1891 to 1905, but notice was given that miners' weight was the standard, that is, 2,464 pounds per ton, and payment demanded at ten cents per ton.

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Answer: It is so found.

14. The receipt offered in evidence by the defendants, of October 25, 1900, signed by George K. Drake, was signed by him upon the representation that it would not be used against him in any lawsuit, but the money would be a payment on account. It was for coal mined from the Marcy vein under the lease of 1865.

Answer: It is not so found, except that it is true the coal referred to was mined from the Marcy vein under the 1865 lease.

15. Statements of the total coal shipped and sold taken from the Marcy vein were rendered to the plaintiffs from 1891 to 1897. The coal was paid for and receipt given October 25, 1900, on oral condition that it was on account and that it was not to be used in any suit.

Answer: It is so found, except as to the alleged "oral condition" which is not so found.

DEFENDANTS' REQUESTS.

4. When the leases involved in this suit were made, the only coal that was merchantable or marketable was what was known then, and is known now, as the prepared sizes, consisting then of part of the chestnut coal and the sizes larger, and consisting now of all of the chestnut coal and the sizes larger.

Answer: It is so found.

6. At the time the leases involved in the present action were made the phrase "miners' weight" meant such quantity of coal, slate and dirt as was agreed upon between the operators and the miners to be sufficient to make a ton of prepared coal, that is to say, such a quantity of the run-of-mine material, including dirt, slate and rock, as should from time to time be agreed upon between operator and miner to be necessary to produce a ton of prepared coal.

Answer: It is not so found. For further answer see the thirteenth general conclusion supra.

Requests, 7, 8, 11 and 12, ask for conclusions of law and for that reason are declined in this connection.

The facts are believed to warrant the following

CONCLUSIONS OF LAW:

1. By the terms of the lease of 1863 lessees and their successors in title became accountable at the stipulated royalty on the same tonnage for which the miners were for the time being paid. During the period now in question the unit for that purpose was the so-called miner's ton of 3,024 pounds of the vein material just as it came from the mine and before going into the breaker.

2. Whether the same was true of the 1865 lease need not now be decided because the parties and their predecessors had for many years voluntarily dealt with each other on another basis not inconsistent with the express terms of the contract, to wit: that of the merchantable yield. That should now be regarded as the established rule to be applied to the mining in the Marcy vein.

3. Therefore in case of the first lease, lessees should account at ten cents per ton of 3,024 pounds on the gross amount of the mine car contents going into the breaker; and in case of the other lease at the same price for the tonnage of all sizes which went to market.

4. It follows that the amount tendered was not enough to cover the claim; and taking the account down to October 1, 1915, with the accrued interest, lessees were then owing for royalties under the first lease the sum of \$7,227.54, and under the other \$2,196.30, as shown in detail by the blueprints hereto attached marked respectively A2 and B.

5. For plaintiff's share of the damages to the surface, defendants should account and pay the sum of \$125, with damages for detention equal to interest at six per cent. annually since the inquiry was complete, a total of \$147.50.

6. The evidence is insufficient to warrant either injunction to restrain the mining or forfeiture of the contracts.

7. A decree should be entered against the defendants representing the estates of Lacoe and Shiffer directing them to pay to the plaintiffs the sum of \$9,571.34, with interest from October 1, 1915.

8. The same defendants should pay the costs.

The requests for legal conclusions not covered by the foregoing are disposed of as follows:

PLAINTIFFS' REQUESTS.

2. The defendants were obliged, under the custom of mining and the contract between the parties, to leave sufficient coal for the support of the surface. Had this been done, the surface would not have been injured, and the coal so left would have been the plaintiffs'.

Answer. Refused. There was no covenant to support the surface; and none was needed. While lessees took title to all the coal, together with the right to mine and remove it, they could only exercise their right subject to liability for damages in case of injury to the surface. There was a sale of the coal with adequate mining rights without any waiver of damages for surface injury.

3. The plaintiffs should be paid for the coal taken which was necessary to support the surface, at fifty cents a ton, its value in place.

Answer. Refused.

6. Plaintiffs, George Drake and his executors, are entitled to have delivered to him and them twelve and one-half tons of coal annually from 1865 to the present, or to be paid therefor.

Answer. Refused. The proofs fail to show any breach by lessees of their covenant to deliver coal on demand as provided in the writing of 1880.

7. The proviso of the lease from Lacoe and Shiffer to Jermyn & Company recognizes the right of support of

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surface, and should have been enforced between the contracting parties, and must now be enforced by decree of this court.

Answer. Refused.

DEFENDANTS' REQUESTS.

1. Where the demise is of all the coal, together with the right to mine and remove the same, the lessee is entitled to take all the coal for a price to be ascertained in the stipulated mode, which, in the present case, was the payment of ten cents per ton on prepared sizes only.

Answer. As to the extent of lessees' right the request is affirmed; but as to the stipulation for royalty on prepared sizes only, it is refused.

If specific answers be desired in case of the omitted requests, or any of them, they will be supplied on exceptions.

DISCUSSION.

I find myself unable to agree with the learned counsel for lessees that their liability is limited to prepared sizes of coal, and was so determined in *Drake et al. v. Lacoe and Shiffer*, 157 Pa. 17. That decree had to do with the Marcy vein only. The parties were held to their own practical interpretation of the lease, and the plaintiffs to the consequences of estoppel. The result was that lessees were required to pay as they had accounted, viz: for the tonnage which went to market. That was consistent not only with the mutual conduct of the parties in their respective treatment of the accounts rendered during the progress of that period of mining, but also with the terms of the contract itself which differ from those in the 1863 lease in that they impose the obligation to pay upon "all the merchantable coal mined from said vein." The mere fact that at the period then in question nothing below the prepared sizes had been marketable, cannot be regarded as limiting the obligation in every

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event; and heretofore it was not so regarded by lessees. In 1876 the mining had been interrupted. It was resumed in 1891 and the second period ran from that date to 1897. In the meantime two things had happened: (1), Drake v. Lacoe had been decided; and (2), a market demand for small sizes had arisen—an event of which lessees were getting the benefit: See lease and accounts of Jermyn & Company. While lessees did not settle for the royalties accruing during this period until 1900, they had regularly accounted, as they eventually paid, for everything that went to market. The voucher for that settlement doesn't show the proportions of each size, but the fact is freely admitted that it included the small sizes. Evidently the delay in payment was due to a dispute between the parties, but it involved no question by lessees that they were liable to that extent, as that was the royalty basis for which they were then contending. Thus both parties are now trying though on wholly different grounds to break the force and the implied effect of that settlement. It conformed to the method of accounting that had been approved in the earlier case because it was held to be too late for plaintiffs to then call it in question. That reasoning must be deemed to apply with at least equal force at this late day; and to both parties alike. Plaintiffs' attempt to avoid the terms of their testator's receipt by parol cannot be seriously entertained. There is no pretense of fraud or deceit as to its contents. On the contrary, the very nature of the parol evidence necessarily assumes that he executed the writing with full knowledge not only of its contents, but of its prima facie legal effect. In his lifetime he never repudiated it, and he survived many years. In the face of positive contradiction on the other side it cannot now be cancelled for the benefit of his successors on the allegation that it was signed with the understanding that its effect should be something other than what he knew it purported to be. Needless to say, if that can

be done, it becomes an idle formality to put any human transaction in writing.

The reciprocal rights and liabilities under the 1863 lease are unaffected by any course of mutual dealing giving rise to a question of practical construction by the parties. So far as drawn in controversy in the former proceeding it was there ruled adversely to lessees that this contract had not become merged with the later one then in suit; and the present case involves no such claim. One is at a loss, therefore, to see upon what theory it is now contended that lessees have accounted according to the royalty basis defined in that case: See their separate answer, par. 4 and 5. In my judgment their theory derives no support from *Coal Co. v. C. & I. Co.*, 225 Pa. 211, and kindred cases founded on a stipulation for royalty on definite sizes. In such instances the parties necessarily have in contemplation the marketable yield as the royalty basis.

It will be observed that nothing is said in this lease about "merchantable" coal. What is granted is "all the coal in, under and upon," etc. What it binds lessees to pay is ten cents a ton "for all coal mined and removed from the premises." If nothing more had been said a different question might arise as to the royalty bearing coal. But the parties to the contract saw fit to adopt a standard and to define it as the ton for which the miner should be paid. That is the undisputed significance of the term "miners' weight," and the weight is taken in the mine car before the contents go into the breaker. They must be presumed to have used the term deliberately and in that sense. It was manifestly inapt if what they had in mind was the yield either of "prepared sizes" or of "merchantable" coal of any size whatever. So, too, if they had intended to commit themselves unalterably to 2,464 pounds, then constituting the miners' ton, it would have been quite as easy, and much less awkward, to say so in so many words or figures. They were at pains to use a trade term which could rationally serve but one purpose,

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namely, to make the royalty payable on the same tonnage for which the miners were being paid during the period of production. As between that and a fixed and invariable weight, it must be presumed they exercised their choice deliberately and for reasons satisfactory to themselves. But this view, say the counsel for plaintiffs, puts the contract of the parties to the hazard of alteration at the hands of strangers, viz: the operator and the miner. The obvious answer is, that the hazard, if any, looks both ways; each party incurred the like risk; instead of an increase, the vicissitudes of the business might have led to a decrease in the weight of the unit; and it was for the parties to say whether they chose to take that speculative chance.

As to plaintiffs' claim for pillar coal it is noted above in the eleventh conclusion of fact that the quantity has not been determined. The grant was entire. It passed all the coal with the right to mine and take it away. As against the express terms of such conveyance no former custom of mining can be successfully invoked: *Coxe v. Heisley*, 19 Pa. 242; *Silliman v. Whitman*, 11 Pa. Superior Ct. 243; *Stoddard v. Emery*, 128 Pa. 436; *Harris v. Sharpless*, 202 Pa. 243. Neither is the question affected by the restriction on methods of operation, *inter alia*, "that sufficient pillars of coal shall be left to support the roof over the gangways and the usual protection of the mines generally." This must be deemed a provision, not for the benefit of the surface, but for the preservation of the colliery with a view to winning the maximum quantity of coal, as in the analogous case of *Miles v. Coal Co.*, 250 Pa. 147, the ruling in which is believed to be decisive against the plaintiffs in this particular; and for that reason it was deemed unnecessary to make any calculation of the quantity taken from pillars on second mining. Lessees are at liberty to take all the coal at the stipulated royalty; their liability for damages to the surface is another thing and is not contested. The fact having been found,

however, that there is no reason to apprehend further surface disturbance, there is no occasion to anticipate any injury calling for preventive relief, and the parties may be properly left to their action for damages if further injury should occur: *Woods v. Coal Co.*, 230 Pa. 197.

Let a decree nisi be entered in accordance with the seventh and eighth general conclusions of law; exceptions, if any, sec. reg.

The final decree, from which both sides have appealed, is as follows:

FINAL DECREE.

And now, 20th day of January, 1917, this cause came on to be heard on bill, answer, replication and proofs, and was fully argued by counsel. Exceptions having been filed to the findings and conclusions of the Chancellor, the same were argued before the court en banc, and thereupon, after full consideration thereof, it is ordered, adjudged and decreed, as follows, to wit:

First.—By the terms of the lease of 1863, the lessees defendants became accountable to the plaintiffs for royalties on coal mined and unpaid for, at royalty per miners' ton of three thousand and twenty-four (3,024) pounds of vein material, in the sum of \$7,227.54, with interest from October 1, 1915.

Second.—By the terms of the lease of 1865, the same defendants owe the plaintiffs for royalties for coal mined from the Marcy vein, under said lease, and unpaid, the sum of \$2,196.30, with interest from October 1, 1915. This is the amount due at ten cents per ton for coal shipped to market.

Third.—By the terms of the leases between the parties, the lessees defendants are indebted to the plaintiffs for damages to the surface, due to the subsidence thereof, in the sum of \$125, with damage for the detention in the sum of \$22.50, or \$147.50.

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Fourth.—An injunction to prevent the further mining of coal in pillars, is refused.

Fifth.—An injunction to restrain the mining, or decreeing forfeiture of the contracts, is denied.

Sixth.—It is ordered that lessees defendants pay to the plaintiffs the sums as decreed in paragraphs 1st, 2d and 3d, as follows:

For coal mined and unpaid for in the veins below the Marcy vein, ...	\$7,227.54
For coal mined and unpaid for in the Marcy vein, ...	2,196.30
For damage to the surface, ...	147.50
Total, ...	\$9,571.34

with interest from October 1, 1915.

Seventh.—All costs in the suit to be paid by the lessees defendants.

Exception to the final decree noted for plaintiffs and defendants.

Plaintiffs and defendants appealed.

Errors assigned were in dismissing exceptions to various findings of fact and law and the decree of the court.

Samuel B. Price, with him *John H. Price*, and *Cole B. Price*, for George Drake et al.—Defendants should account for each ton of 2,464 pounds of mined material: 1 Addison on Contracts, 421, Sec. 282; Jones et al. v. Giles et al., 10 Exch. 119; Hughes v. Humphreys, 3 Ell. & Bl. 954 (77 Eng. C. L. Rep. 954); 35 Cyc. 211; 30 A. & E. Enc. of Law, 463, and cases 2d Ed.; Forsyth v. No. American Oil Co., 53 Pa. 168; Philadelphia City Pass. Ry. Co. v. Henrice, 92 Pa. 431; McAleer v. McMurray, 58 Pa. 126; Hershinger v. Penna. R. R. Co., 25 Pa. Superior Ct. 147.

The contract should be construed according to the laws, usages and facts existing at the time of its execu-

tion: *Reiser v. Wm. Tell Sav. Fund Assn.*, 39 Pa. 137; *Merriam v. U. S.*, 107 U. S. 437; 27 Law Ed. 531; *Berbridge v. Glassey*, 112 Pa. 442; *Reading v. United Traction Co.*, 202 Pa. 571, 575.

The custom of miners is admissible to explain the meaning of the words of a mining lease: *Brown v. Brooks*, 25 Pa. 210; *Williamson v. McClure*, 37 Pa. 402; 1 Addison on Contracts 374; *Carey v. Bright*, 58 Pa. 70; *Williams v. Summers et al.*, 45 Ind. 532; 1 Greenleaf on Ev., Sec. 282-282a, page 319, 12th Ed.; *Brown on Parol Ev.* 202; 17 A. & E. Enc. of Law, 18, 2d Ed.; *Hillside Coal & Iron Co. v. Sterrick Creek Coal Co.*, 239 Pa. 359; *Bickford v. Cooper & Co.*, 41 Pa. 142.

The damages awarded for breach of surface support are inadequate and the measure of damages so restricted that there is no remedy; an injunction should also issue: *Berkey v. Berwind White Coal Mining Co.*, 220 Pa. 65; *Streng v. Buck Run Coal Co.*, 241 Pa. 560; *Woods v. Pittsburgh Coal Co.*, 230 Pa. 197; *Jones v. Wagner et al.*, 66 Pa. 429; *Coleman et al. v. Chadwick*, 80 Pa. 81; *Carlin & Co. v. Chappel*, 101 Pa. 348; *Williams v. Hay*, 120 Pa. 485; *Horner et al. v. Watson et al.*, 79 Pa. 242; *Scranton et al. v. Phillips et al.*, 94 Pa. 15; *Penn Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 Pa. 522.

The court should have decreed a forfeiture of the leases: *Munroe v. Armstrong*, 96 Pa. 307; *Brown v. Vandergrift*, 80 Pa. 142; *Andrews v. Landis*, 24 Pa. D. R. 876; *Chauvenet v. Person*, 217 Pa. 464; *Steelsmith v. Gartland*, 44 L. R. A. 107.

F. W. Wheaton and P. F. O'Neill, with them *S. W. Rhoads and R. W. Rymer*, for John W. Berry, Trustee, et al.—At the date of the leases prepared coal included chestnut and all larger sizes, and merchantable coal consisted entirely of prepared coal: *Wright v. Warrior Run Coal Co.*, 182 Pa. 514; *Dunham v. Haggerty*, 110 Pa. 560; *Lance v. Lehigh & Wilkes-Barre Coal Co.*, 163 Pa. 84; *New York & Pittston Coal Co. v. Hillside Coal*

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& Iron Co., 225 Pa. 211; Drake et al. v. Lacoe et al., 157 Pa. 17.

“Miners’ weight” means such quantity of coal, slate and dirt as was agreed upon between the operators and the miners to be sufficient to make a ton of prepared coal: Drake et al. v. Lacoe et al., 157 Pa. 17.

OPINION BY MR. CHIEF JUSTICE BROWN, June 30, 1917:

The bill filed by Charles Drake, deceased, in which his executors are the substituted plaintiffs, is for an accounting by the defendants for coal mined under two leases. The prayers are also for a decree declaring the leases forfeited for conditions broken, for an injunction if they should not be declared forfeited, and for the ascertainment of damages alleged to have been sustained by reason of the caving in and falling of the surface of the demised lands, caused by the mining and removal by the defendants of the pillars of coal under the surface. The material facts, all of which were properly found by the learned chancellor below, appear in its opinion, made part of the reporter’s notes. From the decree which followed them and the legal conclusions based upon them both sides have appealed.

By the first lease, dated November 28, 1863, Drake leased to the defendants’ predecessors all the coal under seventy-eight acres of land in Lackawanna Township, then Luzerne (now Lackawanna) County, except the upper or Marcy vein, the lessees agreeing to pay an annual minimum rental of \$500, for which they were permitted to remove five thousand tons of coal each year during the term of the lease, which was for ten years and for such other and further time as the lessees and their legal representatives should continue to pay the rent as named in the lease, unless the said term should sooner be ended by nonpayment of rent. For all coal mined in excess of five thousand tons a year the lessees were to pay ten cents per ton. The chief contention between the parties to this proceeding is as to the meaning or effect to

be given to the words in the lease "miners' weight to be the standard" of each ton of coal mined.

In *Drake et al. v. Lacoe et al.*, 157 Pa. 17, we construed the words "miners' weight," used in the lease of November 28, 1863, to mean "such quantity of coal, slate and dirt, as was agreed upon between the operators and the miners to be sufficient to make a ton of prepared coal." In 1863 a "miners' weight" ton in the anthracite region, in which the Drake property is located, was a gross ton plus ten per cent., or 2,464 pounds, in the mine car. It was afterwards increased, and while it has varied somewhat in different sections of the valley in which the leased premises are located, it has been 3,024 pounds in their vicinity since about the year 1870; but, however it may have so varied, "miners' weight" ton has always been the weight of mine-run material which the miner must produce in-order to be paid for mining a ton of coal, the excess being a more or less arbitrary allowance against him for refuse and waste in the mine car content. During the period for which an accounting is asked a "miners' weight" ton has been 3,024 pounds, and upon that basis the defendants are directed by the court below to account under the first lease. The main complaint of the plaintiffs is that the accounting ought to be made on the basis of 2,464 pounds—a "miners' weight" ton at the time of the execution of the lease of 1863. If the intention of the parties to that lease was that the then "miners' weight" ton should be the unvarying standard during the whole term of the lease upon which the royalties were to be paid, they readily could, and most naturally would, have fixed it in figures at 2,464 pounds, for they are presumed to have known that a "miners' weight" ton—the amount of mine-run material which a miner must produce in order to be paid for mining a ton of coal—would vary from time to time with changes in the quality of the material obtained from the mine. "Miners' weight," as we define it in *Drake et al. v. Lacoe et al.*, is not a fixed, unvarying quantity of mine-run material,

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but is such quantity of the same as operators and miners may from time to time agree as being necessary or sufficient to produce a ton of prepared coal. This varying standard was manifestly adopted by the lessor and lessees when they used the well-known trade term "miners' weight"—the ton weight of material required to be mined as equivalent to a ton of prepared coal—and the learned court below properly held that the accounting must be on the basis of a "miners' weight" ton as fixed and agreed upon by the operators and miners during the accounting period.

Nothing said in Drake et al. v. Lacoe et al. sustains the contention of the defendants that their liability is limited to prepared sizes of coal. The decree in that case related to the lease of 1865 of the upper vein, and what we said was that, as the plaintiffs and defendants had placed their own interpretation upon its terms, they were both bound by it.

We need add nothing to what was said by the court below as to the plaintiffs' claim for pillar coal, and we concur in its conclusion that, under the evidence, they were not entitled to an injunction to restrain further mining, nor to a decree declaring the leases forfeited.

Each appeal is dismissed at the costs of the appellants.

Trevorton Water Supply Co. v. Zerbe Township, Appellant.

Contracts—Municipal contracts—Township of second class—Water supply—Acts ultra vires—Estoppel—Act of May 25, 1907, P. L. 231.

1. Townships of the second class are not properly to be regarded as municipal corporations, nor do they possess the implied powers of such corporations. They are only involuntary quasi corporations standing low in the scale of corporate existence and they can exercise only such powers as are expressly conferred upon them by statute.

2. One who contracts with the representatives of a municipality, especially with those having the very limited powers of a quasi corporation such as a township, is bound to know the limitations of the powers of those officials in executing the contract.

3. In an action brought by a water supply company against a township of the second class to recover for the rental of water hydrants, installed under a contract entered into between the water company and the supervisors of the township, in pursuance of the Act of May 25, 1907, P. L. 231, providing that, upon the petition of the owners of a majority of the lineal feet frontage along a highway, the supervisors may contract with water companies for the placing of hydrants along said highway, evidence to show that the petition for the installation of the hydrants was not signed by a majority of the owners abutting upon the highway was erroneously excluded as immaterial, and the trial judge erred in directing a verdict for plaintiff.

4. In such case the supervisors had no authority to provide water supply for fire protection, except upon the terms and conditions set forth in the statute; the plaintiff was bound to know and recognize the limitations upon the powers of the supervisors and could not invoke the principle of estoppel after the work had been done so as to charge the township with liability therefor, where it appeared that the township as an organic unit received no benefit from the work, but certain individuals only, were benefited.

5. It seems that, in such case, if the suit had been brought against the abutting owners who received the benefits, they would be estopped from asserting the invalidity of the contract, it having been performed in so far as they were concerned.

Mr. Justice FRAZER dissents.

Argued May 7, 1917. Appeal, No. 40, January Term, 1917, by defendant, from judgment of C. P. Northumberland Co., May Term, 1913, No. 499, on verdict for plaintiff in case of Trevorton Water Supply Company v. The Township of Zerbe. Before BROWN, C. J., MES-
TREZAT, POTTER, STEWART, FRAZER and WALLING, JJ.
Reversed.

Assumpsit for water furnished for fire protection.
Before CUMMINGS, P. J.

The opinion of the Supreme Court states the case.

Verdict for plaintiff for \$1,785.60 and judgment thereon. Defendant appealed.

TREVORTON W. S. CO. v. ZERBE TWP., Appellant. 33
1917.] Assignment of Errors—Opinion of the Court.

Errors assigned, inter alia, were various portions of the charge.

W. H. M. Oram and Albert Lloyd, for appellant.—The supervisors of a second class township cannot bind a township by a contract which the law gives them no authority to enter into: *Hague v. City of Philadelphia*, 48 Pa. 527; *Scranton v. Jermyn*, 156 Pa. 107; *Reilly v. Philadelphia*, 60 Pa. 467; *Pittsburgh v. Walter*, 69 Pa. 365; *Wimer v. Overseers of the Poor of Worth Township*, 104 Pa. 317; *Millerstown Borough v. Frederick*, 114 Pa. 435; *Filson's Trustees v. Himes*, 5 Pa. 452; *Rice v. Lake Twp.*, 40 Pa. Superior Ct. 337; *Gibson v. Plum Creek Poor District*, 122 Pa. 557; *Good Roads Machinery Co. v. Old Lycoming Township*, 25 Pa. Superior Ct. 156; *Roundsley v. Tuscarora Township School District*, 47 Pa. Superior Ct. 623.

A. G. Shoener and George B. Reimensnyder, for appellee, cited: *Weitz v. Banfield*, 226 Pa. 241; *Moore v. Mayor, Aldermen & Commonalty of the City of New York*, 73 N. Y. 238; *Alexander v. Zerbe Twp. Poor District*, 63 Pa. Superior Ct. 356; *Somerset Borough v. Sweitzer*, 54 Pa. Superior Ct. 283; *Allegheny City v. McClurkan & Co.*, 14 Pa. 81; *Fidelity Trust & Safe Deposit Co. v. West Penn & Shenango Connecting R. R. Co. et al.*, 138 Pa. 494.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

The Act of May 25, 1907, P. L. 231, Section 1, provides "that the road supervisors of any township of the second class in this Commonwealth are hereby authorized and empowered, on the petition of the owners of a majority of the lineal feet frontage along any highway, or portion thereof, in any village within said township, to enter into contract with water companies for the placing of fire hydrants along said highway, for the protection of property from fire.

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"Section 2. The supervisors shall levy, for the maintenance of fire hydrants and the purchase of hose, et cetera, an annual tax upon the property abutting upon said highway, and in the district benefited thereby, based upon the assessment for county purposes. Such tax shall become a lien against such property, and shall be collected in the same manner as other taxes. The collector to receive the same commission as on the road-tax."

In presumed compliance with the terms of this act, a petition was presented to the supervisors of Zerbe Township, Northumberland County, asking them to enter into a contract for the supply of water for fire protection to properties along three streets in the village of Trevorton, on condition that "this petition shall first bear the signatures of the owners of a majority of the lineal feet frontage along every highway herein mentioned, as is required by law," and with the further stipulation that "in the event that this petition shall bear the signatures of the owners of a majority of the lineal feet frontage along each and every highway or street herein mentioned," a tax shall be levied as provided in the act, otherwise the petition shall be treated as void. Pursuant to the prayer of this petition the supervisors entered into a contract with plaintiff water company for the installation of hydrants, to recover for the rental of which this action was brought. The defense set up was that the petition was not signed by the majority of abutting owners as required by the act of assembly.

There was nothing in the petition to indicate that it was signed by a majority of owners abutting upon the highways in question, and, when the contract on which suit was brought was offered in evidence, objection to it was made for that reason. The objection was overruled, and subsequently evidence was offered by defendant and admitted by the court, which tended to show that the majority of abutting owners did not in fact sign the petition. The trial judge held, nevertheless, that the

question of the sufficiency of the petition was immaterial, and affirmed a point that plaintiff was entitled to recover if it had complied with the terms of its contract, and that the township could not set up the defense of ultra vires. The result of the trial was a verdict for the plaintiff, and, from the judgment entered thereon, defendant has appealed.

It should be remembered that townships are not properly to be regarded as municipal corporations, nor do they possess the implied powers of such corporations. They are involuntary quasi corporations, standing low in the scale of corporate existence, and they can exercise only such powers as are expressly conferred upon them by statute. See the opinions in *Dempster v. United Traction Co.*, 205 Pa. 70, and *Haverford Township v. Wilfong*, 60 Pa. Superior Ct. 214, applying this principle to townships of the first class. In the present case the statute gave no power to the township to contract in its own name, and for the benefit of the township as a whole, for a supply of water for fire protection. It merely authorized the supervisors, upon the petition of the owners of a majority of the lineal feet of frontage along a highway, to enter into a contract for water supply for the protection of the abutting property, and it provided that the cost of such protection should be paid by a tax upon the property thus benefited. The township as a whole had nothing to do with the transaction, and received no benefit therefrom. The supervisors were by the statute made merely the representatives of the abutting property owners, and the latter were the parties who received the benefit. If, as appears to be the case, the petition was invalid because it was not signed by a majority of the abutting property owners, so that no tax could be legally levied upon the abutting property, and, if this suit had been brought against the abutting owners who received the benefits, it may very well be that they would be estopped from asserting the invalidity of the con-

tract, it having been performed in so far as they were concerned. But this principle of estoppel cannot justly be applied against the township as a whole, which had no authority to make such a contract, and which received no benefits or advantages under it.

The supervisors had no authority to act of their own will, nor on request of any person or persons except the majority of abutting owners. A similar question was raised in *Reilly v. Philadelphia*, 60 Pa. 467. There an ordinance authorized a contract for paving to be let on condition that the contractor should be chosen by a majority of abutting owners the cost of the work to be borne by the abutting owners. It was said by Mr. Justice WILLIAMS (p. 469): "It is clear that, under the provisions of the ordinance authorizing the paving of Cumberland street, the equitable plaintiff had no authority to pave the street unless a majority of the lot owners, representing at least one-half of the feet front to be paved, selected him, and the department of highways contracted with him to do the work. His selection by a majority of the lot owners and his employment by the department of highways were essential requisites in order to give him authority to do the work, and the right to collect the cost thereof from the owners of property in front of whose premises it was done. If he was not selected by the lot owners, and if he did not contract with the department of highways to do the paving, he was a mere volunteer, and is not entitled to recover from the city or the lot holders the cost of the paving.....The department had no authority to enter into a contract with him unless he was selected by a majority of the lot owners; and he had constructive, if not actual, notice of this on the face of the resolution authorizing the paving of the street, and the making of a contract for the execution of the work."

In the present case, the supervisors had no authority to provide water supply for fire protection, except on the terms and conditions set forth in the statute. The au-

thority therein conferred permitted them to bind only the property of abutting owners with the cost of the improvement, and no authority whatever was given them to saddle that cost upon the township as a whole. Plaintiff was bound to know and recognize the limitations upon the power of the supervisors, within the principle of the rule stated in *Hague v. City of Philadelphia*, 48 Pa. 527, where it was said (p. 530): "We say then that these county commissioners, acting under an authority of the most special and limited kind, had no power to change the site, no right to change the plans and specifications, and not a particle of authority to promise payment for extra work, or to ratify its execution. It was the folly of the contractor to rely upon their directions to proceed outside of his contract. He knew the extent of their powers defined in the law and referred to upon the face of his written contract."

In the case at bar the trial judge deliberately closed his eyes to all proof that the petition was not signed by the owners of a majority of the lineal feet frontage along the highways to be protected, holding that this fact made no difference, if the plaintiff company had performed its part of the agreement. In this ruling he plainly erred. He invoked the principle of estoppel as against the wrong party, the township, it not being the party in whose behalf the contract was made, and not having received any benefits therefrom. Had there been any attempt to make such a contract as this on behalf of the township as a whole, it would have been void for want of power upon the part of the township to enter into any such agreement. As has already been pointed out, the authority given to the supervisors permitted them to enter into a contract only upon the petition of a majority of the abutting owners upon the streets specified, and to levy a tax upon the abutting property to cover the cost of the protection thus afforded. We repeat, the township as such, as an organic unity, had nothing whatever to do with the transaction, and it

would be rank injustice to hold the township, as a whole, liable under a contract made by the supervisors for the specific benefit of a portion only of the people living in the township. It would impose the cost of fire protection for those individuals upon the general taxpayers of the township, without any authority of law, and without benefit to the township as a whole. To make such application of the doctrine of estoppel against municipal organizations, as did the court below, would be to open the door to all manner of fraud upon the part of public officials, and would enable them to bind municipalities by contracts made in utter disregard of the requirements of the law. It would permit the rights and liabilities of municipalities to be determined by the principle of estoppel rather than by the statutes passed for the purpose by the legislature. Such a result will be avoided by enforcing the safe and wholesome rule that one who contracts with the representatives of a municipality, especially with those having the very limited powers of a quasi corporation such as a township, is bound to know the limitations of the power of those officials in executing the contract.

The fourth, fifth, sixth, eighth, fourteenth, fifteenth, sixteenth, and seventeenth assignments of error are sustained, and the judgment is reversed, with a *venire facias de novo*.

Mr. Justice FRAZER dissents.

Camp et al., to use, Appellants, v. John et al.

Judgments—Presumption of payment—Evidence.

1. After the expiration of twenty years from maturity, judgments, mortgages and all like obligations are presumed paid and it requires satisfactory and convincing evidence to overcome that presumption.

2. On a *sci. fa.* brought by a use-plaintiff on a judgment entered

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on an indemnity bond given by a collector of taxes where it appeared that the judgment had been entered more than twenty years prior to the issuance of the writ where there was no satisfactory evidence to overcome the presumption of payment by lapse of time, a judgment was properly directed for the defendant.

Submitted May 7, 1917. Appeal, No. 107, Jan. T., 1917, by plaintiffs, from judgment of C. P. Northumberland Co., Dec. T., 1910, No. 243, on directed verdict for defendant in case of David Camp, George Robertson, and Richard Irvin, now for the use of Nicholas Dursky v. C. Elmer John, Administrator of Estate of Hugh McDonald, deceased, with notice to Ann McDonald, John McDonald, Hugh McDonald, Mary Jane Welsh, nee McDonald, now intermarried with William Welsh, and William Welsh, her husband, James D. Dorsey, minor child of Annie Dorsey, nee McDonald, deceased, late intermarried with James Dorsey, and James Dorsey, her husband, terre-tenants. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Scire facias sur judgment. Before MOSER, J.

The opinion of the Supreme Court states the case.

Verdict for defendant by direction of the court and judgment thereon. Plaintiffs appealed.

Error assigned, inter alia, was in directing verdict for the defendants.

J. Mal. Gillespie, for appellants.

W. H. M. Oram, for appellees.

OPINION BY MR. JUSTICE WALLING, June 30, 1917:

Hugh McDonald was collector of taxes for the poor district of Mount Carmel Township, Northumberland County, for the years 1885 and 1886; and as such gave a bond in \$2,500.00, with David Camp, George Robert-

son and Richard Irvin as sureties. He made default and to indemnify the sureties gave them his personal bond, in like amount, on which a cautionary judgment was entered June 16, 1888, in the Court of Common Pleas of said county. By reason of such default judgment was entered in said court against the tax collector and his sureties on April 15, 1890, on the bond first above mentioned, and liquidated in the sum of \$2,115.28. Mr. McDonald died November 1, 1890; and in 1893 by virtue of an execution issued on said last named judgment two pieces of land were seized and sold by the sheriff, as belonging to his estate. At said sale the property was bought jointly by Camp, Irvin and Robertson at the price of \$100.00, subject to a mortgage of \$3,720.00. Within a very short time the property was resold for \$6,000.00. During the same year (1893) the sureties paid said judgment to the poor district, and in 1897 it was satisfied of record, the sureties never having taken any steps to become subrogated to the rights of the plaintiff therein.

In 1895 Mr. McDonald's widow brought ejectment against the purchasers of the said two pieces of land, which suit was compromised by giving her a verdict of \$1,900.00. At the time of his death, Mr. McDonald seems to have been the owner of two other pieces of land, the deed for which was not placed upon record until 1899, and so far as appears he left no other estate.

On November 7, 1910, the use-plaintiff, having obtained an assignment of the judgment entered on the indemnity bond, issued thereon a writ of scire facias sur judgment against the administrator of the estate of Hugh McDonald, deceased, with notice to his widow and heirs as terre-tenants. In defense it was set up, inter alia, that the presumption of payment had arisen because of lapse of time. The only evidence submitted at the trial materially tending to rebut the presumption of payment was that of one of the two executors of the Robertson estate, to the effect that the one-third part of the judg-

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ment paid by that estate to the poor district had never been repaid to him or to his knowledge. There was nothing to show that the judgment on which this writ was issued had not been paid to Camp or Irvin or to the other executor of the Robertson estate.

This appeal is from the action of the trial court in directing a verdict and judgment for the defendants, which action was based largely on the ground that the evidence was not sufficient to rebut the presumption of payment arising from the lapse of time; wherein we find no error. After the expiration of twenty years from maturity, judgments, mortgages and all like obligations are presumed paid; and it requires satisfactory and convincing evidence to overcome that presumption: *Gregory v. Commonwealth*, 121 Pa. 611; *Fidelity Title & Trust Company v. Chapman*, 226 Pa. 312; *Miller v. Overseers of the Poor of the City of Williamsport*, 17 Pa. Superior Ct. 159. Whether the facts relied upon to rebut such presumption are true is for the jury, but whether if true they are sufficient is for the court: *Beale's Executors v. Kirk's Administrator*, 84 Pa. 415; *Peter's App.*, 106 Pa. 340; *Porter v. Nelson*, 121 Pa. 628. Here the cautionary judgment was entered in 1888, and the liability of the sureties became fixed by the entry of judgment against them on the collector's bond, April 15, 1890, and the twenty-year period is properly computed from that date, and was therefore complete on April 15, 1910, over six months before the writ in this case was issued, and the presumption arising thereon is alone sufficient to defeat plaintiff's claim: *Hummel v. Lilly*, 188 Pa. 463. A judgment for a contingent liability is sustained by the same presumptions as other judgments: *Black on Judgments*, Section 72. It is not necessary that the original judgment be opened in order to interpose the defense of presumption of payment arising from lapse of time.

As a general rule where the property of the debtor is sold at sheriff's sale he is not entitled to the profits re-

sulting from a resale, but here the fact that the property was bought by the sureties for a nominal consideration and almost immediately resold for a very large sum might seem to suggest that it was done by arrangement to protect the sureties and also the McDonald estate, especially in view of the fact that they made no application to be subrogated in the other judgment. However, we do not regard that matter as essential to a decision of the case.

The assignments of error are overruled and the judgment is affirmed.

. Vocca, Appellant, v. Pennsylvania Railroad Company.

Negligence—Automobiles—Railroads—Contributory negligence—Guest—Testing danger.

1. It cannot be said as a matter of law that a guest or passenger in a vehicle is guilty of negligence because he has done nothing. In many such cases the right degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in results.

2. In an action to recover damages for personal injuries sustained by the plaintiff in a collision between plaintiff's automobile and a railroad train, it appeared that plaintiff, a clergyman, was riding in the automobile as a guest of one of his parishioners who had sent the automobile for him. The automobile was driven by the chauffeur of the parishioner. The collision was the result of joint negligence in the operation of the train and the automobile. Both the plaintiff and the chauffeur were familiar with the streets over which they were to pass and both knew of the railroad crossing where the accident occurred. There was evidence that plaintiff when about 100 feet from the railroad track heard a noise which seemed to him the noise of an approaching train; that the driver was then going about fifteen or twenty miles an hour; that plaintiff called to him to stop—which call the driver said he did not hear—and the next thing plaintiff knew the automobile was in

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collision with the car. The lower court entered a compulsory nonsuit. *Held*, error, and that the case was properly for the jury.

Argued May 7, 1917. Appeal, No. 140, Jan. T., 1917, by plaintiff, from order of C. P. Fayette County, Dec. T., 1914, No. 557, refusing motion to strike off compulsory nonsuit in case of James A. Vocca v. Pennsylvania Railroad Company, a corporation. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Reversed.

Trespass to recover damages for personal injury.

The facts appear in the opinion of the Supreme Court. Before REPPERT, J.

The court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

Error assigned was in refusing to take off the nonsuit.

H. S. Dumbauld, for appellant.—The negligence of the driver could not be imputed to the passenger: *Carlisle Borough v. Brisbane*, 113 Pa. 544; *Senft v. Western Maryland Ry. Co.*, 246 Pa. 446; *Shultz v. Old Colony St. Ry. Co.*, 193 Mass. 309 (79 N. E. 873); *Chadbourn v. Springfield St. Ry. Co.*, 199 Mass. 574 (85 N. E. Repr. 737); *Carr v. City of Easton*, 142 Pa. 139; *Wachsmith v. Baltimore & Ohio R. R. Co.*, 233 Pa. 465; *McLaughlin v. Pittsburgh Rys. Co.*, 252 Pa. 32.

R. W. Playford, for appellee, cited: *Crescent Twp. v. Anderson*, 114 Pa. 643; *Dean v. Penna. R. R. Co.*, 129 Pa. 514; *Dunlap v. Philadelphia Rapid Transit Co.*, 248 Pa. 130.

OPINION BY MR. JUSTICE STEWART, June 30, 1917:

The plaintiff, a clergyman, was advised over the 'phone of the severe illness of a parishioner, and that his pastoral services without delay were requested. He was ad-

vised at the same time that an automobile would be sent to bring him to the appointed place. Very promptly the automobile—the property of the married daughter of the invalid with whom the latter was making her home—arrived in charge of the daughter's chauffeur, an experienced driver. The clergyman and the driver were the sole occupants of the car when it started on its return, the clergyman sitting in the seat to the rear. Both were familiar with the streets over which they were to pass, and both knew of a railroad crossing that they would encounter on their way. The surroundings of this crossing gave little opportunity to see an approaching train on the railroad. On this occasion a train approached the crossing without having given any signal, and at the same time the chauffeur approached it with his car without stopping, looking or listening, with the result that a collision occurred in which the automobile was wrecked totally, and the clergyman received more or less injury, while the driver escaped unhurt. The plaintiff brought the present action to recover compensation for his injuries. The court below directed a nonsuit on the ground that his own negligence had contributed to the accident.

In his opinion filed the learned trial judge says: "The chauffeur was admittedly negligent. The plaintiff, in the face of a danger which was not only known to him, but of which he was then apprehensive, voluntarily committed himself and his safety to the driver of the car, and, as was said in *Dean v. Pennsylvania R. R. Co.*, 129 Pa. 514, he joined the driver in testing the danger, and he is responsible for his own act." A verdict to this same effect would not have called for the court's interference. As much could be said of a verdict to the contrary. This is but another way of saying that the facts were for the jury and not for the court. The plaintiff was a guest in the automobile in which he was riding when the accident occurred; he was no more in control of the car than he would have been of the owner's house had he been a guest

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therein. He was where he was by invitation of the owner. Whatever the negligence of the driver, the owner's servant, it could not be imputed to the plaintiff, except as some express sanction by him of the driver's negligence appears, or circumstances showing clearly that plaintiff was in position to see and know the danger himself and made no effort to protect himself. Certainly no express sanction by the plaintiff of the driver's negligence can be derived from the evidence, and the case is reduced to the single question whether, under all the circumstances as presented in the evidence, the plaintiff made reasonable effort to protect himself.

A very well considered case which bears directly upon the point, and which we may here cite approvingly, is *Hermann v. Rhode Island Co.*, 36 R. I. 447. We quote therefrom as follows (p. 450): "It cannot be said as a matter of law that such a guest or passenger is guilty of negligence because he has done nothing. In many such cases the right degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in results. While it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless he should not in any case be held guilty of contributory negligence merely because he has done nothing. If there be threatened danger which is known to the passenger and unobserved by the driver, the passenger would be guilty of negligence if he failed to notify and warn the driver; also, if the driver be careless or reckless in his conduct and this is known to the passenger, and there be reasonable opportunity to do so, it would be the passenger's duty to caution the driver and remonstrate with him, and if the latter persisted in his improper conduct, to leave the ve-

hicle; but manifestly that would not be possible nor could it be required in every case."

All we have before us in the present case, in addition to what we have referred, is that plaintiff, when about 100 feet from the railroad track, heard a noise which seemed to him the noise of an approaching train; that the driver was then going about 15 or 20 miles an hour; that he called to him to stop—which call the driver says he did not hear—and the next thing he knew the automobile was in collision with the car. It may be a close case on its facts, but in the absence of any fixed legal standard of duty, it is, we think, for the jury to say whether under the facts the plaintiff was chargeable with negligence in failing to do something that a reasonably prudent and cautious man would have done in order to avoid the injury. At the conclusion of plaintiff's case, the court directed a nonsuit which it subsequently declined to remove. In this we think was error. The case was for the jury. The assignment of error is sustained and the judgment is reversed with a procedendo.

Springer's Estate.

Decedents' estates—Executors and administrators—Wills—Joint will—Surcharge—Failure to file account—Commissions.

Three unmarried and childless sisters made a will providing in part as follows: "We hereby order and direct that at the death of the one of us who shall first depart this life, all the property of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, real, personal or mixed, and whether owned by her individually or jointly or as tenant in common with the other two of us, shall pass to and become vested absolutely in the survivors of us, and the two survivors shall pay all her just debts and funeral expenses. At the decease of the one who shall next depart this life, all her estate of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, whether owned by her, individually, or jointly, or as tenant in common with the other sur-

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vivor, and including what she shall acquire under this will as her share of the estate of the one of us who first died, shall pass to and become vested, absolutely, in the last survivor, and the last survivor shall pay all debts and funeral expenses then unpaid of the two who have previously died. We further order and direct that this will shall not be probated, unless necessary to determine the title of property herein disposed of, nor shall any appraisement, whatever, except for collateral inheritance tax, be made of any or either of our estates, until after the decease of the last survivor of the three of us, but that all our respective estates shall pass to and become vested in the survivors in kind as they shall be at the time of our respective deaths." After the death of the last surviving sister the executor under the will filed an account for her estate. Certain of the residuary legatees filed exceptions asking that the executor be surcharged for failure to convert assets and securities belonging to the estates of the two sisters who first died and to account for the same, that he be surcharged for failure to include certain notes belonging to the said estates, and that the executor's commissions be disallowed. The Orphans' Court refused to surcharge the executor and allowed the commissions. *Held*, no error.

Argued May 7, 1917. Appeal, No. 141, Jan. T., 1917, by George S. Rizer, Benjamin H. Rizer, Albert A. Rizer, Mary F. Rizer and Florence M. Kunst, by G. H. A. Kunst, their attorney in fact, from order of O. C. Fayette Co., June Court, 1916, No. 53, dismissing exceptions to adjudication in Estate of Elizabeth B. Springer, deceased. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Exceptions to adjudication. Before WORK, P. J.

The opinion of the Supreme Court states the case.

The court dismissed the exceptions to the adjudication. George S. Rizer et al. appealed.

Errors assigned, inter alia, were in dismissing the exceptions, the refusal of the court to surcharge the executor for failure to make annual statements, for failure to charge himself with interest, for failure to charge himself with promissory notes given by J. V. Thompson and not collected, and in allowing executor commissions.

John L. Hechmer, of the West Virginia Bar, with him
H. S. Dumbauld, for appellants.

A. E. Jones, with him *D. W. Henderson*, for appellee.

PER CURIAM, June 30, 1917:

Mary Ann Springer, Elizabeth B. Springer and Sarah J. Springer were unmarried and childless sisters, who, in April, 1900, made a will, the material portion of which on this appeal is as follows: "We, Mary Ann Springer, Elizabeth B. Springer and Sarah J. Springer, sisters, all of North Union Township, Fayette County, Pennsylvania, do hereby make and publish this our and each of our last will and testament, as follows: We hereby order and direct that at the death of the one of us who shall first depart this life, all the property of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, real, personal or mixed, and whether owned by her individually or jointly or as tenant in common with the other two of us, shall pass to and become vested absolutely in the survivors of us, and the two survivors shall pay all her just debts and funeral expenses. At the decease of the one who shall next depart this life, all her estate of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, whether owned by her, individually, or jointly, or as tenant in common with the other survivor, and including what she shall acquire under this will as her share of the estate of the one of us who first died, shall pass to and become vested, absolutely, in the last survivor, and the last survivor shall pay all debts and funeral expenses then unpaid of the two who have previously died. We further order and direct that this will shall not be probated, unless necessary to determine the title of property herein disposed of, nor shall any appraisement, whatever, except for collateral inheritance tax, be made of any or either of our estates, until after the decease of the last survivor of the

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three of us, but that all our respective estates shall pass to and become vested in the survivors in kind as they shall be at the time of our respective deaths. At the decease of the last survivor of the three of us, we dispose of all our property, real, personal or mixed which shall then remain as follows: We direct our executor hereinafter named, as soon as he deems it advisable so to do, to sell all our personal estate at public sale, and our real estate, except as hereinafter provided, at either public or private sale, as he may deem best, and to distribute the proceeds thereof as follows":

Mary died December 19, 1906; Sarah, October 3, 1907, and Elizabeth, June 28, 1913. Upon the death of each of these sisters their will was admitted to probate and letters testamentary issued to D. M. Hertzog, the appellee, as executor. This appeal is from the refusal of the court below to surcharge him and to the allowance of commissions.

In asking that the appellee be surcharged for his failure to convert the assets and securities belonging to the estates of the two sisters who first died, and to account for the same, the appellants overlook the provisions in the will by which each sister gave to the survivors "in kind" all of the property of every kind whatsoever of which she died seized, or to which she was entitled at the time of her decease, real, personal or mixed, and whether owned by her individually or jointly, or as tenant in common with the other two, to become vested absolutely in the survivors; and this was followed by a direction to the executor that no "appraisement, whatever, except for collateral inheritance tax," should be made of the estates of the two who died first. The estates of Mary and Sarah, who died first, are not involved in the settlement of Elizabeth's estate, it not appearing that anything to which she was entitled out of the estate of her two sisters had been withheld from her by the appellee. The will clearly contemplated the settlement of but one estate, and the appellee has in-

cluded in the settlement of that estate—Elizabeth's, who was the "last survivor"—all that she had acquired from any source. In the settlement of her estate has he done anything, or omitted to do anything, he ought to have done, which makes him liable to surcharge or calls for a forfeit of his commissions?

After a review of all the evidence in the case we concur in the conclusion of the learned court below, that the appellee, as executor, exercised common skill, common prudence and common caution in the settlement of Elizabeth's estate, and approve the following from the opinion dismissing the exceptions to his account: "At the audit twelve witnesses, nine of whom were leading members of the bar, testified that Mr. Thompson's reputation financially as a safe person and one in whom trust and confidence could be reposed up until the time of his failure was very good; that he was trusted generally by the people; that his financial standing was not questioned until about the time of his failure. And that the executor's reputation as a good, safe business man was very good, and that his standing as a member of this bar was very good. The testimony further shows that no suits were entered against Mr. Thompson before December, 1914, and that the executor handled the estate's claims in the same manner and with the same skill and judgment that he handled other claims placed in his hands for collection and pursued the same general course that all the other members of this bar pursued. We think the course pursued by the executor would have been approved by the testatrix had she been living: *McNair's App.*, 4 Rawle 148." To the foregoing it may be properly added that from the records of this court it is manifest that any effort on the part of the appellee to recover from J. V. Thompson would have been unavailing.

Under an unbroken line of cases from *Calhoun's Est.*, 6 Watts 185, down to *Skeer's Est.*, 236 Pa. 404, the decree of the court below was a proper one, and the appeal from it is dismissed at the costs of the appellants.

**Leonard v. Baltimore & Ohio Railroad Company,
Appellant.**

Negligence — Railroads — Ejection of passenger at dangerous place—Damages—Compensatory and exemplary damages—Pleadings—Statement of claim—Amendment—Departure—Measure of damages—Present worth—Instructions—Failure to request more specific instructions.

1. In an action of tort, damages necessarily following as a natural and probable result of the injury may be proved without special averment as defendant will be presumed to be aware of such consequences of his conduct, and hence cannot plead surprise when proof of such injury is made. Damages of a special nature and not the usual consequences of the wrong complained of, however, must be specially averred that defendant may be informed of the claim and given an opportunity to prepare his defense; but where the action is for injuries to the person the jury may consider, without special averment, pain and suffering, expense incurred for medical treatment and loss of time caused by inability to work at the usual occupation of the injured person, inasmuch as these are the natural and usual results of an injury.

2. In an action to recover damages for death of plaintiff's husband due to the alleged negligence of the employees of defendant railroad company in ejecting deceased from its car at a dangerous place, in consequence of which he was killed by a passing train, defendant complained of the admission in evidence of matters tending to show loss of earnings and profits of deceased as a farmer as a basis for compensatory damages, where plaintiff's statement claimed exemplary and punitive damages only. The statement first contained an averment that plaintiff claimed damages "in the sum of twenty-five thousand dollars (\$25,000) and in addition to the above sum claims punitive damages from said defendant company, upon a cause of action whereof the following is a statement." Succeeding paragraphs set forth the manner in which deceased met his death, and that his loss of life was due to defendant's employees "wilfully, wantonly, knowingly and unlawfully" ejecting him from its train at a dangerous place. Plaintiff also averred deceased's occupation was that of a farmer and that he "derived great gains and emoluments from tilling the soil and kindred industries, a large portion of which went to the maintenance and support of her and her family," of which she had been deprived through the negligence of defendant. Plaintiff also claimed to recover for funeral

expenses, and for the loss of the companionship of her husband. The concluding paragraph stated: "Wherefore, and by reason of which, she claims damages in the sum of twenty-five thousand dollars as exemplary damages, and in addition thereto she claims punitive damages for the wilful, wanton, reckless, careless and unlawful conduct" of defendant's employees. Plaintiff admitted the terms "exemplary damages" and "punitive damages" were synonymous in practice, and claimed the word "exemplary" was inserted in the statement by mistake for the word "compensatory." No offer to amend in this respect appears to have been made but, in dismissing defendant's motion for a new trial, the court below held the testimony offered as to loss of earnings was fully covered by the paragraph of the claim relating to the occupation of deceased and that the limitation in the concluding paragraph did not necessarily prevent the introduction of evidence to show compensatory damages. Defendant did not plead surprise and case was tried on above theory. *Held*, no error.

3. The error in the statement might have been amended at any time since it would not set up a new cause of action barred by the statute of limitations. The cause of action being the wrongful act of negligence resulting in the injury to the plaintiff, an amendment merely adding an additional item of claim for damages issuing out of the same wrongful act is not a departure.

4. In such case, in charging on the measure of damages based on the earnings of the deceased, the court said that in fixing the amount of earnings the jury should consider the age, health, ability and disposition to labor and the habits of living of deceased and referred to the testimony touching the extent of his farming occupation. *Held*, that although the instruction in this respect was brief it was not erroneous and in the absence of a request from defendant for further specific instructions, did not constitute reversible error.

5. In such case, in instructing the jury on the question of the present worth of future earnings, the court charged: "So far as compensation depends or is estimated upon future earnings or accumulations, such earnings or accumulations are to be anticipated and capitalized and their present worth determined. That is, what lump sum paid now would be their equivalent?" *Held*, that the instruction, although brief, was a correct statement of the law and that in the absence of a request for more extended charge, did not constitute reversible error.

Negligence—Railroads—Evidence—Res gestæ—Conversation—Rulings by trial judge—Questions considered on appeal.

6. In negligence cases where the actual occurrence is confined to a brief space of time, the *res gestæ* of the transaction is accord-

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Syllabus—Arguments.

ingly limited, and the period when declarations become merely a narrative of a past occurrence ordinarily begins immediately after the accident. If the transaction is complete and ended, its ending marks the limitation of the *res gestæ* of the event and declarations subsequent thereto become merely narrative of past matters.

7. In an action against a railroad company to recover damages for death of plaintiff's husband through alleged negligence of defendant's employees in ejecting him from its car at a dangerous place, the admission of evidence over defendant's objection of a conversation between the conductor of the train and the witness shortly after deceased had been ejected and after the train had departed from the next station after receiving and discharging passengers at that stop, was reversible error.

8. Where plaintiff's evidence as to a conversation after the accident was objected to as not being pertinent and plaintiff's counsel urged its competency because of "its happening so close to the time" and immediately afterwards the trial judge overruled defendant's objection, it cannot be urged on appeal that the question of *res gestæ* was not considered or ruled in the court below.

Argued May 7, 1917. Appeal, No. 143, Jan. T., 1917, by defendant, from judgment of C. P. Fayette Co., Dec. T., 1915, No. 2963, on verdict for plaintiff in case of *Victoria Leonard v. Baltimore and Ohio Railroad Company*. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Reversed.

Trespass to recover damages for death of plaintiff's husband. Before REPPERT, J.

The opinion of the Supreme Court states the case.

Verdict for plaintiff for \$6,194 and judgment thereon. Defendant appealed.

Errors assigned were the admission of certain evidence, various portions of the charge and failure to direct verdict for defendant.

D. W. McDonald, with him *James R. Cray* and *Thomas H. Hudson*, for appellant.—The averments of the statement did not warrant the admission of testimony as to compensatory damages: *Laing v. Colder*, 8

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Special instructions should have been given as to the testimony relating to the earnings of decedent: Goodhart v. Penna. R. R. Co., 177 Pa. 1; McLane v. Pittsburgh Rys. Co., 230 Pa. 29; Herbert v. Rainey, 162 Pa. 525; Bornscheuer v. Consolidated Traction Co., 198 Pa. 332; Bates v. Carter Construction Co., 255 Pa. 200.

Instructions as to present worth were wholly inadequate: McLane v. Pittsburgh Rys. Co., 230 Pa. 29; Pauza v. Lehigh Valley Coal Co., 231 Pa. 577; Reitler v. Penna. R. R. Co., 238 Pa. 1; Gerber v. Philadelphia, 60 Pa. Superior Ct. 119.

The conversation with the train conductor should have been excluded: Briggs v. East Broad Top R. R. & Coal Co., 206 Pa. 564; Ogden v. Penna. R. R. Co., 1 Monaghan (Pa.) 249.

E. C. Higbee, of Sterling, Higbee & Matthews, for appellee.—The statement is sufficient to sustain the cause of action. If there was a defect in the statement, it was purely formal and was cured by the verdict: Jones v. Freyer, 3 W. N. C. 365; Corson v. Hunt & Abrahams, 14 Pa. 510; Pittsburgh National Bank of Commerce v. Hall, 107 Pa. 583.

The charge of the trial judge was not erroneous, and if inadequate, there should have been a request for further instructions: Burns v. Penna. R. R. Co., 239 Pa. 207; Fortney v. Breon, 245 Pa. 47.

The conversation with the conductor was part of the *res gestæ*: Commonwealth v. Werntz, 161 Pa. 591.

OPINION BY MR. JUSTICE FRAZER, June 30, 1917:

Defendant appeals from a judgment for plaintiff for the death of her husband due to the alleged negligence of defendant's employees in ejecting him from its car at a dangerous place, in consequence of which he was killed by a passing train. It being conceded the ques-

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tion of negligence was for the jury, the assignments of error are consequently confined to the admission of evidence and charge of the court.

The first assignment complains of the admission of evidence of the number of acres in decedent's farm, the different crops cultivated and other similar matters tending to show loss of earnings and profits, as a basis for compensatory damages, the objection to such evidence being that plaintiff's statement claimed exemplary and punitive damages only, and consequently defendant was without notice or opportunity to meet and rebut the evidence so given. The statement first contains an averment that plaintiff claims damages "in the sum of twenty-five thousand dollars (\$25,000) and in addition to the above sum claims punitive damages from said defendant company, upon a cause of action whereof the following is a statement." Succeeding paragraphs set forth the manner in which deceased met his death, and that his loss of life was due to defendant's employees "wilfully, wantonly, knowingly and unlawfully" ejecting him from its train at a dangerous place. Plaintiff also avers deceased's occupation was that of a farmer and that he "derived great gains and emoluments from tilling the soil and kindred industries, a large portion of which went to the maintenance and support of her and her family," of which she had been deprived through the negligence of defendant. Plaintiff also claims to recover for funeral expenses, and for the loss of the companionship of her husband. The concluding paragraph states: "Wherefore, and by reason of which, she claims damages in the sum of twenty-five thousand dollars (\$25,000) as exemplary damages, and in addition thereto she claims punitive damages for the wilful, wanton, reckless, careless and unlawful conduct" of defendant's employees. Plaintiff admits the terms "exemplary damages" and "punitive damages" are synonymous in our practice, and claims the word "exemplary" was inserted in the statement by mistake for

the word "compensatory." No offer to amend in this respect appears to have been made, however, but, in dismissing defendant's motion for a new trial, the court below held the testimony offered as to loss of earnings was fully covered by the paragraph of the claim relating to the occupation of deceased and that the limitation in the concluding paragraph did not necessarily prevent the introduction of evidence to show compensatory damages. The opening paragraph, as mentioned above, avers plaintiff asks damages to the extent of \$25,000, without stating the nature or character of the damages. Had the language of the concluding paragraph omitted the words "exemplary damages," there would be no room to deny a compensatory claim.

In an action of tort, damages necessarily following as a natural and probable result of the injury may be proved without special averments, as defendant will be presumed to be aware of such consequences of his conduct, and hence cannot plead surprise when proof of such injury is made: *Hart v. Evans*, 8 Pa. 13; *Laing v. Colder*, 8 Pa. 479; 13 Cyc. 175. Damages of a special nature and not the usual consequences of the wrong complained of, however, must be specially averred that defendant may be informed of the claim and given an opportunity to prepare his defense: 13 Cyc. 176; *Hart v. Evans*, supra; *Laing v. Colder*, supra, but where the action is for injuries to the person the jury may consider, without special averment, pain and suffering, expense incurred for medical treatment and loss of time for inability to work at the usual occupation of the injured person, inasmuch as these are the natural and usual results of an injury: *Laing v. Colder*, supra; *Penna. & Ohio Canal Co. v. Graham*, 63 Pa. 290. Under the general averments in the statement of claim showing the occupation deceased followed during his lifetime, the evidence objected to was admissible without special averment, and the plaintiff under such circumstances should not be precluded, by an apparent clerical error,

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from recovering compensation. The general averments of the statement, exclusive of the last paragraph, were notice to defendant of what it would be called upon to meet, and although the defect was one which might very properly have been amended, had not the trial judge concluded the statement was sufficient as it stood, the trial proceeded on the theory of a claim for compensatory damages, no claim of surprise or motion for continuance being made by defendant. Under the circumstances we do not deem the first assignment sufficient to justify a reversal. Plaintiff might have corrected the error at any time by amendment, such amendments having been allowed even in the appellate court: *Brothers v. Mitchell*, 157 Pa. 484.

As the case must go back for a new trial it may be proper to suggest that the error in the statement be amended. Such amendment, aside from the construction we have put upon the plaintiff's statement, and assuming that compensatory damages have not been claimed, would not set up a new cause of action barred by the statute of limitations. The cause of action is the defendant's act of negligence resulting in injury to plaintiff. An amendment merely adding an additional item of claim for damages issuing out of the same wrongful act is not a departure. This court has frequently held that an amendment simply introducing an additional element of damage arising out of the same circumstances may be allowed at any time: *Puritan Coal Mining Co. v. Penna. R. R. Co.*, 237 Pa. 420; *Armstrong & Latta v. Philadelphia*, 249 Pa. 39.

The second assignment of error complains of inadequacy of the court's charge, in so far as it relates to the measure of damages based on the earnings of deceased, and also as to the instructions for determining the present worth of future earnings. The court charged that in fixing the amount of earnings the jury should consider the age, health, ability and disposition to labor and the habits of living of deceased and referred to the

testimony touching the extent of his farming operations. While the instruction in this respect is brief it is not erroneous, and if defendant desired further specific instructions, a request to that effect should have been made: *Fortney v. Breon*, 245 Pa. 47. On the question of present worth, the court charged: "So far as compensation depends or is estimated upon future earnings or accumulations, such earnings or accumulations are to be anticipated and capitalized and their present worth determined. That is, what lump sum paid now would be their equivalent?" Here also the instruction, although brief, is a correct statement of the law, and, if counsel considered a more extended charge necessary, a request to that effect should have been made. Had a total absence of adequate instruction on this point appeared the court would be chargeable with reversible error, even though no request for a specific charge upon that subject was made by counsel: *McLane v. Pittsburgh Rys. Co.*, 230 Pa. 29. The charge on this branch of the case while not erroneous would no doubt have been of greater help to the jury had the question of present worth been more fully enlarged upon.

The third assignment refers to the admission of evidence of a conversation between the conductor of the train and a witness shortly after deceased had been ejected and after the train had departed from the next station, after receiving and discharging passengers at that stop. The conversation complained of consisted of a question by the witness addressed to the conductor asking his reason for ejecting deceased "in front of that passenger train, when you knew the passenger train was due?" to which the conductor made no reply, the inference being an admission on the part of the latter of negligence. The reception of this evidence cannot be sustained on the ground of being part of the *res gestæ*, as contended by plaintiff. At the time, the incident was a bygone event, the transaction complete and the conversation between the conductor and the witness merely

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a reference to past events, at most an expression of opinion on the part of the witness as to the responsibility for the accident and the failure of the conductor to reply. In negligence cases the actual occurrence is usually confined to a brief interval of time and the *res gestæ* of the transaction accordingly limited; consequently the period when declarations become merely a narrative of a past occurrence ordinarily begins immediately after the accident: *Keefer v. Pacific Mutual Life Ins. Co.*, 201 Pa. 448. The question is not merely as to the measure of time or distance between the main occurrence and the subsequent conversation. A transaction may cover a considerable period of time or it may be completed in a moment and each case of this character must necessarily depend upon its particular circumstances. Hence, whether a few minutes or half an hour elapsed between the occurrence and the conversation is not the sole criterion for determining the competency of the latter as evidence. If, as in this case, the transaction is complete and ended, its ending marks the limitation of the *res gestæ* of the event, and declarations subsequent thereto become merely narrative of past matters. In the present case the occurrence was ended, the parties had departed from the scene of the accident, and, although but a short time had elapsed, the conversation was clearly outside the *res gestæ* of the transaction: *Keefer v. Pacific Mutual Life Ins. Co.*, *supra*; *Greed v. Manufacturers' Light & Heat Co.*, 238 Pa. 248, 252; *Oster v. Schuylkill Traction Co.*, 195 Pa. 320.

It is also suggested the evidence was objected to as not being pertinent and its inadmissibility cannot now be maintained for other reasons. This objection might be sustained were it not that the record further shows plaintiff's counsel urged its competency because of its "happening so close to the time." Immediately after this suggestion, as the record discloses, the trial judge overruled defendant's objection. In this condition of

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the record, we cannot say the court did not rule on the question of *res gestæ*:

The third assignment of error is sustained, the judgment is reversed and the record is remitted with a *procedendo*.

Commonwealth ex rel., Appellant, v. Strickler.

Cities—Councilmen—Disclosure of interest—Quo warranto—Act of June 27, 1913, P. L. 568.

A writ of quo warranto issued under the provisions of Section 9, Article IV of the Act of June 27, 1913, P. L. 568, Sec. 9, providing for the ousting of councilmen who should vote without disclosing any personal or private interest in the measure voted upon, was held properly quashed, where all that appeared was that the councilmen in question had voted for a tenant as janitor of a municipal building and that the tenant was at the time of the election indebted to him for rent.

Argued May 7, 1917. Appeal, No. 146, Jan. T., 1917, by plaintiff, from order of C. P. Fayette Co., March T., 1916, No. 758, quashing writ of quo warranto in case of Commonwealth of Pennsylvania ex rel., S. John Morrow, District Attorney of Fayette County, v. J. Arthur Strickler. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Appeal dismissed.

Quo warranto to oust public official. Before REPERT, J.

The opinion of the Supreme Court states the case.

A writ of quo warranto was issued and subsequently quashed. Commonwealth appealed.

Error assigned was the order quashing the writ.

H. S. Dumbauld, for appellant.

A. E. Jones, with him *J. B. Adams*, for appellee.

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PER CURIAM, June 30, 1917:

The appellee, while a member of council of the City of Uniontown, voted for a certain person as janitor for one of the municipal buildings. The man for whom he voted was his tenant, indebted to him for rent at the time of the election, and this proceeding was instituted against him to oust him from his office as councilman, under Section 9, Article IV, of the Act of June 27, 1913, P. L. 568, which is as follows: "A member who has a personal or private interest in any measure or bill proposed or pending before the council shall disclose the fact to council, and shall not vote thereon, nor take any part in the discussion of the same. If such interested person shall vote without disclosing his interest in such measure or bill, and the same be carried by his vote, he shall forfeit his office, and the measure or bill shall be void."

A writ of quo warranto was issued in pursuance of the suggestion for it, but was subsequently quashed by the court below. That it was properly quashed appears from the following in the opinion quashing it: "As applied to the facts of this case the word 'interest' in the section of the act above quoted means pecuniary interest. We do not think it can be contended that in an election of city employees a councilman voting for one with whom he has business relations, who might be indebted to him or to whom he might be indebted on current account, would, for that reason, offend against the section of the act referred to and subject himself to its penalties. A councilman can have no possible pecuniary interest or profit within the meaning of the act in the salary of a municipal employee, even should the relation of debtor or creditor exist between them. The salary is paid directly to the employee for a personal service in the rendering of which and in the compensation for which necessarily no one but himself can be concerned. It is true that the grocer with whom he deals and the landlord of whom he rents his house may be on the council that em-

ployed him and may have voted to employ him, but that gives them no interest in his wages or the right to any portion of them. The section is manifestly not aimed at such a state of facts, or at any such relation. If the relation in itself is not of such a character as to come within the prohibition of the act, then the implication of the sixth paragraph of the suggestion must be of some misconduct by the defendant or McDonald or both, or of some corrupt understanding between them. For this, clearly, should it exist, the remedy is in Section 7, of Article IV, instead of Section 9."

Appeal dismissed at appellant's costs.

Peoples Trust Co. of Pittsburgh, Appellant, v. Safe Deposit & Trust Co. of Pittsburgh.

Equity—Corporations—Names—Confusion of names.

A bill in equity to restrain a corporation from filing in the office of the secretary of the Commonwealth a certificate showing its change of name was properly dismissed where the evidence offered by the plaintiff did not sustain the conclusion averred in the bill, namely, that the change of name against which it protested would result in confusion in the business of the plaintiff and defendant.

Argued May 8, 1917. Appeal, No. 83, Oct. T., 1917, by plaintiff, from decree of C. P. Allegheny Co., Jan. T., 1917, No. 2115, dismissing bill in equity in case of Peoples Trust Company of Pittsburgh v. The Safe Deposit & Trust Company of Pittsburgh. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Bill in equity praying that defendant be restrained from filing in the office of the Secretary of the Commonwealth a certificate showing the change of its corporate name,

CARPENTER, J., found the following facts:

First. The Safe Deposit & Trust Company of Pittsburgh was incorporated by act of assembly approved January 24, 1867, P. L. 116.

Second. The Peoples Savings Bank of Pittsburgh was incorporated by act of assembly approved April 17, 1868, P. L. 1207.

Third. The Peoples Trust Company of Pittsburgh was incorporated in 1901 pursuant to Act of Assembly of April 29, 1874, P. L. 73, and supplements and amendments thereto.

Fourth. The Safe Deposit & Trust Company owns or controls all the stock of the Peoples Savings Bank.

Fifth. On the 6th day of January, 1917, the said Safe Deposit & Trust Company filed its application with the Secretary of the Commonwealth, for change of name and title to that of "Peoples Savings & Trust Company of Pittsburgh," said application being in due form and pursuant to vote of the stockholders of the applicant taken January 5, 1917.

Sixth. Prior to January 6, 1917, to wit, December 21, 1916, the Peoples Trust Company filed in the office of the Secretary of the Commonwealth, a protest against the change of name set out in Finding No. 5.

Seventh. On January 6, 1917, the Secretary of the Commonwealth approved the action of the Safe Deposit & Trust Company, and the application for change of name, and issued a certificate in accordance therewith.

Eighth. The Safe Deposit & Trust Company is located and conducts its business at the corner of Fourth avenue and Wood street in the City of Pittsburgh.

Ninth. The Peoples Trust Company is located and conducts its business at 1738 Carson street, in said City of Pittsburgh.

Tenth. The location of the Safe Deposit & Trust Company is in the business center of what is popularly known as the "Old City," and the location of the Peoples Trust Company is between 17th and 18th streets

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in that portion of the city popularly known as the
"South Side."

Eleventh. The places of business of plaintiff and defendant are approximately one and nine-tenths (1.9) miles apart, the sections of the city in which they are respectively located being separated by the Monongahela river.

Twelfth. The evidence offered by plaintiff does not sustain the conclusion averred in the bill, to wit: that the change of name against which it protests will result in confusion in the business of plaintiff and defendant, or, to any appreciable degree, will be detrimental to the interests of either or to their present or prospective customers.

Upon the facts as found the court, inter alia, found the following conclusion of law:

"Fourth. The change of name from Safe Deposit & Trust Company to Peoples Savings & Trust Company is not a violation of the rights of the Peoples Trust Company."

The bill was accordingly dismissed. Plaintiff appealed.

Error assigned, inter alia, was in dismissing the bill.

Edward J. McKenna, of *McKenna & McKenna*, with him *William H. Lemon*, for appellant.

Thomas Patterson, with him *James S. Crawford* and *Patterson, Crawford, Miller & Arensberg*, for appellee.

PER CURIAM, June 30, 1917:

This appeal is dismissed and the decree of the court below affirmed, at appellant's costs, on the tenth, eleventh and twelfth facts found by the learned chancellor below, and the fourth conclusion of law which logically followed them.

Commonwealth v. Anthony, Appellant.

Criminal law—Murder—Murder of the first degree—Charge—Evidence—Cross-examination.

1. A verdict of murder of the first degree was sustained where there was evidence to show that while the deceased and a third party were engaged in a fight the defendant heard the quarreling, came from a house some distance away, removed his coat, picked up a shovel, lifted the shovel with both hands and approaching the deceased from the back struck him a severe blow on the side of the head, from which blow deceased died.

2. In such case the court committed no error in refusing a point charging that there was no evidence to establish an intent to take life.

3. In such case the court committed no error in refusing to permit the attorney for the defendant to further cross-examine a witness produced by the Commonwealth in rebuttal to prove that the deceased had been seen at a specified time where such further cross-examination related to the location of other parties subsequent to the time testified to by the witness.

Argued May 14, 1917. Appeal, No. 123, Jan. T., 1917, by defendant, from sentence of Oyer and Terminer Cumberland Co., Feb. Sessions, 1917, No. 17, on verdict of murder of the first degree in case of Commonwealth of Pennsylvania v. James Anthony. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Indictment for murder.

The main facts appear in the following portion of the charge by SADLER, P. J.:

Now, you will consider all that was said as to these contradictions, whether they were as to essential facts, and whether the explanations made by Bigler, Walton and Hamlet on the stand were satisfactory. As we remember, they all admitted that they had stated that they did not know the man, but explained that they meant thereby that they did not know the name, and not that

they did not identify Anthony. You will remember, however, what was said.

In rebuttal, the Commonwealth offered evidence to show that Anthony's story was untrue. Daniel Huntsberger and William Rynard were called. They had charge of the bar on the nineteenth. They swore that Anthony did not come there and purchase liquor as he testified.

Joseph A. Weibley and Holmes Koser testified that Anthony was on the six o'clock trolley car in the evening, leaving for Carlisle. If they are correct, they contradict in part not only Anthony, but the story of Hall and Milly Ross.

Mr. Whitaker testified that he was not intoxicated, as he claimed, when he came to the commissary at one o'clock, and that his appearance and conduct so showed.

Clifford Woodson testified to seeing Anthony out at the water closet at the time Ury was removed on the wagon from the pump house, and Charles Hamlet testified to Josey Jones' statement to him that she had told James not to go down to the pump house, but that he had said he would not stand for any one attacking one of his color.

Briefly then, gentlemen, this is the testimony in chief, in defense and in rebuttal. I have not attempted to give it all, but you will remember every part.

There is a wide conflict. It will be for you to test the facts by considering the circumstances which surround the case—the possible interest of the parties—their credibility—the corroboration of the statements which they made, and to give credence where it belongs.

Now it seems to us that certain clear facts stand out prominently, though the facts are all for you.

First. Ury is dead. Second. He died as a result of a blow on the head delivered by a blunt instrument. Next, that Hamlet and Ury had been fighting, and Bigler and Walton were present and interfered. Next, that while scuffling, some colored man ran across the road, took

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off his coat, crossed the coal pile, lifted the shovel with both hands and approaching Ury from the back, struck him a severe blow on the side of the head, so severe that the witness for the defense, Mary Gamble, heard the crack on her porch, at the red house and that the man ran back the same way, picked up his coat and made off. These facts are testified to with variations by witnesses on both sides.

The real conflict is—who was this man? Besides the dead man, six persons were present when the blow was delivered or saw it struck. Bigler, Mr. Miller, Mrs. Miller, Hamlet and Walton—all five of whom swore the man was Anthony, and Mary Gamble, who swears it was not. Testimony was offered to throw discredit on the identification of Hamlet and Walton, as you will remember, and of Bigler by showing that he said the man went out the other door, and that he did not know the man. But as we remember, no such contradictions were shown as to Miller and his wife, whose story is corroborated in many respects, other than the identification, and the statement of the colored woman, by witnesses on both sides. Were they correct or were they mistaken?

Now the defendant claims he did not commit the offense, being intoxicated in his room, and to his location there Hall, Milly Ross, Gracey Webster and Josey Jones also testify. If they are correct, then the others are wrong. It will be for you to say which story is correct.

Anthony's story as to his purchase of drinks is attacked by the testimony of Huntsberger and Rynard, his intoxication at one o'clock by Whitaker, his presence in the yard in the afternoon by Woodson, and in the trolley car in the evening by Weibley and Koser. And if Weibley and Koser are correct, they also contradict in part the stories of Milly Ross and Hall, who said Jim was in his room after six o'clock. Now somebody is wrong or mistaken; to use no harsher expression, who it is will be for you.

Verdict of guilty of murder of the first degree. Sen-

tence of death was subsequently passed. Defendant appealed.

Errors assigned were as follows:

First. The court erred in not affirming without qualification, the defendant's third point.

The point and answer found in the charge of the court are as follows:

To constitute murder in the first degree in this case there must have been an actual intent to take the life of Michael Ury by the man who struck him with the shovel, and there is no evidence to establish such intent. The burden rests on the Commonwealth to show beyond a reasonable doubt that the killing was intentional and wilful. In Pennsylvania the law presumes a murder no higher than the second degree, the burden resting on the Commonwealth to establish a higher grade of crime.

Answer: Refused as stated. The point would be affirmed were it not for the phrase "there is no evidence to establish such intent." This is a question for the jury under the evidence, and instructions which we will subsequently give you.

Second. The court erred in instructing the jury as follows:

Would the facts indicate that the blow was delivered with an intent to kill, and was deliberately delivered and with premeditation? Is this shown by the acts of preparation in taking off the coat, approaching the back of the man to be attacked.

Third. The court erred in instructing the jury as follows:

Would the facts indicate that the blow was delivered with an intent to kill, and was deliberately delivered and with premeditation? Is this shown by the acts of preparation in taking off the coat, approaching the back of the man to be attacked, with shovel upraised in both hands, and the delivery of a blow on the head so hard as to make it crack.

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Assignment of Errors.

Fourth. The court erred in refusing to permit counsel for the defendant to continue in his cross-examination of Clifford Woodson, as follows (Record pp. 613, 614).

Q. He was there in the open?

A. Yes.

Q. Can you say how soon after that you saw Hamlet?

A. Yes.

Q. How long after?

A. I saw him about five minutes after that.

The Court: That is as far as you can go. He was called to show merely that he saw the defendant, who had said he was in his room at the time—that he had seen him at a specified time—as to what he saw when he met Anthony, we will allow him to testify, not beyond that.

Mr. Berg: Give us an exception.

The Court: Yes; if you put it in the shape of an offer.

Mr. Berg: It is intended to further interrogate the witness on the stand for the purpose of ascertaining the correctness of his story, and to attack his credibility.

By the Court: The witness having been called by the Commonwealth in rebuttal to contradict the statement of the defendant, Anthony, that he was in his room the whole of the afternoon, by showing at a certain time after the fight he was in the yard between the red and yellow houses, and having been called for that purpose alone, and the purpose of the present offer being to inquire as to the location of other parties subsequent to the time testified to by him, the testimony is refused, it not being proper cross-examination of the witness called in rebuttal for the purpose of contradicting a statement of the defendant as to his location in his room the whole of the afternoon. The movements of the witness after the time concerning which he was called to testify, would not be admissible in this cross-examination. Exception noted for the defendant.

Fifth. The court erred in entering the following judgment:

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The sentence of the court upon you is that you shall suffer death by having passed through your body a current of electricity of sufficient intensity to cause death, and the application of such current must be continuous until you are dead, and the said punishment shall be inflicted as directed by the Act of June 19, 1913, P. L. 528.

Herman Berg, Jr., for appellant.

William A. Kramer, with him John D. Faller and George E. Lloyd, District Attorney, for appellee.

PER CURIAM, June 30, 1917:

In the performance of the duty imposed upon us by the Act of February 15, 1870, P. L. 15, we have reviewed both the law and the evidence in this case, and find that the ingredients necessary to constitute murder of the first degree were proved to exist on the trial of the prisoner. The instructions complained of in the first, second and third assignments are free from error. The latitude asked for by the prisoner's counsel in the cross-examination of the witness called by the Commonwealth in rebuttal, was properly denied, for the reason given by the learned trial judge. The fifth and last assignment complains only of the judgment, which is now affirmed, with direction that the record be remitted for the purpose of execution.

Furlow, Appellant, v. Roland, Executor.

Decedents' estates—Claim for domestic services—Nonsuit.

In an action against the executor of a decedent's estate for domestic services rendered testatrix, judgment of nonsuit was properly entered where there was no proof of an express promise, and the testimony and presumption rebutted an implied promise to pay

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for the services rendered and where the presumption that the plaintiff was paid at stated intervals was not overcome.

Argued May 14, 1917. Appeal, No. 336, Jan. T., 1916, by plaintiff, from judgment of nonsuit of C. P. Lancaster Co., Sept. T., 1915, No. 25, in case of Annie L. Furlow v. J. D. Roland, Executor of Lucetta Lehn. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Assumpsit to recover for domestic services. Before HASSLER, J.

The opinion of the Supreme Court states the case.

The trial judge entered a compulsory nonsuit which the court subsequently refused to strike off. Plaintiff appealed.

Error assigned was in refusing to strike off judgment of nonsuit.

B. F. Davis, for appellant.

M. G. Schaeffer, for appellee.

PER CURIAM, June 30, 1917:

The claim of the appellant is for domestic services rendered appellee's testatrix. The nonsuit, which the court below refused to take off, was entered by the trial judge for three good reasons: (1) The plaintiff declared on an express promise by the defendant's decedent to pay her for the services rendered, but at the trial failed to prove any such promise; (2) even though the plaintiff could recover, under her statement, on an implied promise, the testimony showed that the services were rendered under such circumstances as to rebut a promise to pay for them; and (3) even though the plaintiff could recover under her statement on an implied promise, and the services were such as to imply a promise on the part

of the decedent to pay for them, she cannot recover because there is a presumption that she was paid at stated intervals.

Judgment affirmed.

Hollinger's Estate (No. 1).

Decedents' estates—Election to take against will—Exemption—Acts of April 1, 1909, P. L. 87, and July 21, 1913, P. L. 875—Appraisal—Exemption in cash.

1. Where a husband elects to take his \$5,000 exemption under the Acts of April 1, 1909, P. L. 87, and July 21, 1913, P. L. 875, in cash, an appraisal is not necessary.

2. The husband of a testatrix elected to take against his wife's will and in the written election recited that the estate in question consisted of personal property, and particularly declared his desire to have \$5,000 allotted to him therefrom as allowed by the Act of April 1, 1909, P. L. 87. It appeared that the entire property for distribution consisted of cash or its equivalent. The auditing judge awarded decedent's husband the requested allowance, in addition to one-half of the remaining portion of her estate. Exceptions were filed to the \$5,000 award because there was no appraisal as provided by the Act of 1909. *Held*, the exceptions were properly dismissed.

Argued May 14, 1917. Appeal, No. 16, Jan. T., 1917, by Celinda L. Harnish, Ann L. Weidler, Abraham L. Weidler, George L. Weidler, Caroline L. Smith, Elmira L. Eby, Anna Seibert, Susan Forry, Samuel Brubaker and John Brubaker, collateral heirs of Susan L. Hollinger, Deceased, from decree of O. C. Lancaster Co., March T., 1916, No. 24, dismissing exceptions to adjudication in Estate of Susan L. Hollinger, deceased. Before BROWN, C. J., POTTER, STEWART, MOSCHISKE and WALLING, JJ. Affirmed.

Exceptions to adjudication. Before SMITH, P. J.

The opinion of the Supreme Court states the case.

The court dismissed exceptions filed to the award of

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\$5,000 to Martin B. Hollinger, husband of decedent. The collateral heirs appealed.

Error assigned was in dismissing exceptions to the adjudication.

William N. Appel, of *Appel & Appel*, for appellants.

B. F. Davis, for appellee.

OPINION BY MR. JUSTICE MOSCHZISKE, June 30, 1917:

Martin B. Hollinger, by a duly signed, acknowledged and recorded document, which was filed with the clerk of the court below and served upon the personal representative of his deceased wife, elected to take against the latter's will. In this written election, Mr. Hollinger recited that the estate in question consisted of personal property, and particularly declared his desire to have \$5,000 allotted to him therefrom, as allowed by the Act of April 1, 1909, P. L. 87. When the estate came before the Orphans' Court for adjudication, the auditing judge took cognizance of this election and awarded decedent's husband the requested allowance, in addition to one-half of the remaining portion of her estate. Exceptions were filed to the \$5,000 award, "because there was no appraisalment, as provided by the Act of 1909 and its supplement"; and, upon their dismissal, this appeal was entered.

Appellants contend that a duly confirmed appraisalment is essential to the validity of an allowance under the Act of 1909, *supra*; and that making such an award in the absence of this prerequisite constitutes reversible error.

The act in controversy stipulates that "the procedure for appraising and setting apart the said \$5,000 in value of property shall be the same as provided in Section 5 of the act of assembly approved April 14, one thousand eight hundred and fifty-one, relating to widows' exemp-

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tions" (P. L. 612). The Act of July 21, 1913, P. L. 875, supplementing the Act of 1909, provides that "the appraisement and setting apart shall be made by the appraisers appointed to appraise the other personal estate of decedent," and that, should any one of such appraisers be unable to act, the Orphans' Court may appoint another in his place and stead.

Under the Act of 1851, *supra*, it was early decided (Larrison's App., 36 Pa. 130) that, when the election is to take the amount of the exemption in cash or its equivalent, an appraisement is not necessary, this ruling, which was followed by the court below, being founded upon the theory that "to appraise money is to count, and counting answers all the purposes of appraisement" (Peterman's App., 76 Pa. 116, 120); this doctrine has been consistently adhered to ever since: see *Seller's Est.*, 82 Pa. 153, 157; *Finney's App.*, 113 Pa. 11, 16; *Towanda Bank's App.*, 1 Mona. (Pa.) 463; *Beetem v. Getz*, 5 Pa. Superior Ct. 71, 76; *Rigby's Est.*, 8 Pa. Superior Ct. 108, 112; *Sharp v. Woolslare*, 25 Pa. Superior Ct. 251, 254.

We find no departure from the rule followed in the foregoing authorities; in fact, the rule in question is plainly recognized even in *Buckland's Est.*, 239 Pa. 608, 612, cited by appellants; we there said: "Cases may arise under the Act of 1909, as they have under the Act of 1851, in which the estate may be of such a character as to make an appraisement unnecessary."

Of course, in cases where real estate is chosen as part of the \$5,000 allowance, or in other instances where something more than mere counting is required to measure the property taken, an appraisement must be had; and, when necessary, it must be made as provided in the relevant acts of assembly. Under the facts at bar, however, where the entire property for distribution consists of cash or its equivalent (*Finney's App.*, *supra*), no error was committed in dispensing with the formality of an appraisement.

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The assignments are overruled and the decree is affirmed.

Hollinger's Estate (No. 2).

Decedents' estates—Election to take against will—Share of husband—Lapsed legacies.

1. Testatrix left no children and all the legacies provided for in her will save one had lapsed by reason of the deaths of the respective legatees prior to that of testatrix. The husband of testatrix elected to take against her will. He was awarded the \$5,000 exemption allowed by the act of assembly. The balance for distribution, consisting of personalty, was awarded one-half to appellant and the remainder after deducting the one unlapsed legacy to decedent's next of kin according to the intestate law. The husband filed exceptions contending that he was entitled to the entire personal estate represented by the lapsed legacies. The auditing judge dismissed the exceptions. *Held*, no error.

Practice, Supreme Court—Assignments of error to exceptions to adjudication—Failure to quote decree.

2. Assignments of error to exceptions to adjudication in the Orphans' Court are not in proper form which quote the exceptions but not the ruling of the court thereon.

Argued May 14, 1917. Appeal, No. 8, Jan. T., 1917, by Martin B. Hollinger, from decree of O. C. Lancaster Co., March T., 1916, No. 24, dismissing exceptions to adjudication in Estate of Susan L. Hollinger, deceased. Before BROWN, C. J., POTTER, STEWART, MOSCHIZSKER and WALLING, JJ. Affirmed.

Exceptions to adjudication. Before SMITH, P. J.

The opinion of the Supreme Court states the case.

The court dismissed exceptions filed by Martin B. Hollinger to adjudication. Martin B. Hollinger appealed.

Errors assigned were in dismissing exceptions to ad-

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judication, each assignment quoting an exception but not the decree of the court.

B. F. Davis, for appellant.

William N. Appel, of *Appel & Appel*, for appellees.

OPINION BY MR. JUSTICE MOSCHZISKE, June 30, 1917:

This is an appeal by Martin B. Hollinger from a decree of the Orphans' Court of Lancaster County directing distribution of the estate of his late wife, Susan L. Hollinger, deceased.

When the account of the administrator c. t. a, was called for audit, it appeared that Mrs. Hollinger left no children and that all the legacies provided for in her will, save one of \$1,000, in favor of John Brubaker, had lapsed, by reason of the deaths of the respective legatees previous to that of the testatrix. Mr. Hollinger claimed \$5,000, under the Act of April 1, 1909, P. L. 87, which was allowed him by the court below. The net balance for distribution, consisting entirely of personalty, was awarded, one-half to appellant, and the remainder, after deducting the \$1,000 legacy, to decedent's next of kin according to the intestate law. Appellant complains of this latter award, contending that he is entitled to the entire personal estate represented by the lapsed legacies, less certain deductions for debts and expenses.

The following excerpt from the opinion of the learned President Judge of the court below so fully and correctly disposes of the points involved, we need add nothing thereto: "Susan L. Hollinger made her will, and, with the exception of John Brubaker, lived longer than the legatees named in it, who were not in a class protected against the lapsing of legacies; therefore, the testatrix died intestate as to nearly all of her estate. As the whole of it is personalty and there was no issue, all of it [would have] descended to her husband, Martin B. Hollinger, save [that portion of the estate represented

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by the amount of] the bequest to John Brubaker, had he [the husband] done nothing.....; but he chose to elect to take against her will and thereby reduced his interest to the same as would have been hers had she survived him and elected to take against his will; and no less was awarded him by the decree to which he has taken exception. In the light of Lee's App., 124 Pa. 74, it would be a work of supererogation to offer anything in support of the legality of the award; therefore, the exceptions in behalf of Martin B. Hollinger are dismissed."

We see no merit in any of the assignments of error, and, furthermore, none of them is in proper form (*Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 270; *Browarsky's Est.*, 252 Pa. 35, 38); they are all dismissed.

The decree is affirmed.

Mylin v. Hurst, Appellant.

Wills—Real estate—Rule in Shelley's Case—Act of April 27, 1855, P. L. 368—Trusts—Dry trusts.

Testator devised to his grandson a farm and wood lot "for and during the term of his natural life and after his death unto his lawful issue and in case he has no lawful issue, then unto his next of kin, in fee." He further named a trustee for the estate given to his grandson and directed the trustee "to keep properly insured and in good order and repair all buildings" on the property. No funds were provided for insurance or repairs. *Held*, that the trust was dry and passive and not sufficient to prevent the operation of the rule in Shelley's Case, and that the grandson took an estate tail, which was enlarged by the Act of April 27, 1855, P. L. 368, into a fee.

Submitted May 14, 1917. Appeal, No. 61, Jan. T., 1917, by defendant, from judgment of C. P. Lancaster Co., Dec. T., 1915, No. 81, for plaintiff, on case stated, in case of Marius H. Mylin, Jr., v. S. Grace Hurst. Be-

fore BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Case stated to determine title to land. Before HASSLER, J.

The opinion of the Supreme Court states the case.

The court entered judgment in favor of the plaintiff for \$8,000 in accordance with the terms of the case stated. Defendant appealed.

Error assigned was in entering judgment in favor of the plaintiff and against the defendant.

John M. Groff, for appellant.—The intention of testator was to create a life estate in favor of the plaintiff and this intention rules: *Packer's Est.* (No. 1), 246 Pa. 97; *Yarnall's App.*, 70 Pa. 335; *Hastings v. Engle*, 217 Pa. 419; *Stout v. Good*, 245 Pa. 383; *Lauer v. Hoffman*, 241 Pa. 315.

The rule in *Shelley's Case* cannot be invoked where the will creates an active trust: *Eshbach's Est.*, 197 Pa. 153; *Little v. Wilcox*, 119 Pa. 439; *Hemphill's Est.*, 180 Pa. 95; *Xander v. Easton Trust Co.*, 217 Pa. 485; *West's Est.*, 214 Pa. 35; *Strickler's Est.*, 250 Pa. 105; *Ahl v. Liggett*, 246 Pa. 246; *McIntosh's Est.*, 158 Pa. 528; *Frantz v. Race*, 205 Pa. 150; *Dodson v. Ball*, 60 Pa. 492; *Owens v. Naughton*, 23 Pa. Superior Ct. 639.

Oliver S. Schaeffer, for appellee.—Plaintiff took an estate in fee by operation of the rule in *Shelley's Case* and the Act of April 27, 1855, P. L. 368: *Armstrong v. Michener*, 160 Pa. 21; *Brinton v. Martin*, 197 Pa. 615; *Lauer v. Hoffman*, 241 Pa. 315; *McElwain v. Whitacre*, 251 Pa. 279.

The trust is a dry or passive trust, which is not affected by the rule in *Shelley's Case*: *McCormick v. Sypher*, 238 Pa. 185; *Owens v. Naughton*, 23 Pa. Su-

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perior Ct. 639; Marsh v. Platt, 221 Pa. 431; Carson v. Fuhs, 131 Pa. 256; Hemphill's Est., 180 Pa. 95.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

This is a case stated for the opinion of the court as to the title to land. In the will of Francis Mylin, of Lancaster County, dated April 7, 1896, he devised to his grandson, Marius H. Mylin, Jr., a farm in Providence Township and a wood lot in Drumore Township "for and during the term of his natural life, and after his death unto his lawful issue and in case he had no lawful issue, then unto his next of kin, in fee."

The testator also provided in his will as follows: "I direct my executor and the trustees hereinafter named to keep properly insured and in good order and repair all buildings on my properties wherever they may be," and "I nominate and appoint my friend Christian Hoover trustee of the estate herein given to my grandson, Marius Mylin, Jr., with whom my said grandson resides, and I nominate and appoint my nephew, Samuel M. Mylin, Esq., of Pequea Township, trustee of the estate herein given to my grandson, Francis Marion Mylin. And finally I nominate and appoint my said nephew, Samuel M. Mylin, Esq., the executor of this my last will and testament."

The court below was of opinion that under the will, the plaintiff took title in fee simple to the land, and entered judgment for the purchase-price the defendant having purchased the land.

That the devise to the grandson for life, and after his death unto his lawful issue, created an estate tail, enlarged by the statute into a fee, is not to be doubted. In Taylor v. Taylor, 63 Pa. 481, Mr. Justice SHARSWOOD said (p. 483): "The word 'issue' in a will means *prima facie* the same thing as 'heirs of the body,' and in general is to be construed as a word of limitation."

In Ogden's App., 70 Pa. 501, Mr. Justice AGNEW said (p. 508): "It is well settled that a devise to the lawful

issue of the first taker is *prima facie* a limitation to the heirs of the body of the devisee, and therefore vests a fee tail; and this is the case even where the devise to the first taker is expressly for life."

In *Armstrong v. Michener*, 160 Pa. 21, the devise was, as in the present case, to the devisee for life, and at his death to his issue, and in default of issue to his next of kin. It was held that the devisee, by the operation of the rule in *Shelley's Case* and the Act of April 27, 1855, P. L. 368, took an estate in fee. To the same effect is the decision in *Arnold v. Muhlenberg College*, 227 Pa. 321, 326.

But it is suggested that the testator created an active trust for the land in question which would prevent the application of the rule in *Shelley's Case*. If, however, the trust interposed was dry or passive, it would not affect the operation of the rule: *Carson v. Fuhs*, 131 Pa. 256; *Marsh v. Platt*, 221 Pa. 431; *McCormick v. Sypher*, 238 Pa. 185; *Ahl v. Liggett*, 246 Pa. 246.

By the terms of the will, the legal title to the land was placed in the grandson. The only duty imposed upon the trustee was that of keeping the buildings upon the land insured and in good order. But no funds were provided for insurance or repairs. The grandson was entitled to the possession, control and beneficial enjoyment of the property for the term of his life, without interference by the trustee. It does not appear from the case stated that there are any buildings upon the land in question, but if there are they can be kept insured and repaired by the cestui que trust as readily as by the trustee. The court below rightfully held that the trust was dry and passive, and not sufficient to prevent the operation of the rule in *Shelley's Case*.

As the present will was executed prior to July 1, 1897, the rule of construction required by the Act of July 9, 1897, P. L. 213, does not apply.

The judgment is affirmed.

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Syllabus—Statement of Facts.

Anderson, to use, v. Kern et al., Appellants.

Mortgages—Foreclosure—Assignment—Production of bond—Defenses—Evidence—Practice, Supreme Court—Question not raised below.

1. The production of a bond secured by a mortgage is not essential to recovery in an action on the mortgage.

2. The question whether the assignment of a mortgage absolute on its face was in point of fact subject to the right of redemption by the assignor upon payment by him of a debt owed the assignee will not be considered by the Supreme Court where it has not been raised in the court below.

3. Where in an action of scire facias sur mortgage the defense was that the use-plaintiff's title was defective, that the mortgage was not the absolute property of the party who had assigned it to the use-plaintiff, but was held as collateral for a debt, but where the assignor of the use-plaintiff testifying for defendant stated that he had received the mortgage by assignment absolute on its face as security for the payment of \$3,000, one-half of which was to be paid in cash and the balance by a transfer to the witness of a promissory note, that all was to be paid at the maturity of the note, and that if not so paid the assignment of the mortgage was to be absolute, that upon maturity the note remained unpaid, so that the assignment by the terms of the agreement testified to by defendant's witness became absolute, the evidence presented did not constitute a defense to the action and the trial judge made no error in directing a verdict for plaintiff.

Argued May 14, 1917. Appeal, No. 73, Jan. T., 1917, by B. F. Davis, terre-tenant, from judgment of C. P. Lancaster Co., October T., 1913, No. 36, on directed verdict for plaintiff on scire facias sur mortgage in case of William Anderson, to the use of James G. Fowkes, now to the use of John E. Malone, v. Emanuel Kern, Mortgagor, with notice to B. F. Davis, Terre-Tenant. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Scire facias sur mortgage. Before HASSLER, J.

The opinion of the Supreme Court states the case.

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The court directed a verdict for the plaintiff and judgment was entered thereon. B. F. Davis, terre-tenant, appealed.

Errors assigned were various instructions of the court and the admission of certain evidence.

B. F. Davis and John A. Coyle, of Coyle & Keller, with them C. Eugene Montgomery, for appellant.

John E. Malone, with him Joseph W. Kenworthy and John M. Groff, for appellee.

OPINION BY MR. JUSTICE WALLING, June 30, 1917:

On March 3, 1899, Emanuel Kern, being the owner of a piece of land containing about nine and one-half acres and situated at Safe Harbor, Lancaster County, Pa., executed a mortgage thereon to William C. Anderson for five thousand dollars, which was accompanied by a bond. On May 12, 1900, Anderson, by an assignment absolute upon its face, transferred the mortgage and accompanying bond to James G. Fowkes, together with Kern's certificate of no defense. The mortgage and assignment were duly recorded. Thereafter, in December, 1900, Fowkes was adjudged a bankrupt, and in 1913 his trustee for a valuable consideration assigned the bond and mortgage to John E. Malone, the use-plaintiff. Subsequent to the execution of the mortgage, the land covered thereby was transferred by divers conveyances until, by a sheriff's sale in 1907, the title became vested in B. F. Davis, the terre-tenant, herein called the defendant, who interposed a defense to the scire facias issued upon the mortgage. The court below at the conclusion of the trial instructed the jury to find a verdict for the plaintiff for the full amount of the mortgage and interest; and this appeal was taken by the defendant from the judgment entered thereon.

The bond accompanying the mortgage was not pro-

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duced in court and seems to have been lost while in the possession of the trustee in bankruptcy. However, its production was not essential to plaintiff's right of action upon the mortgage: *Brownell v. Oviatt*, 215 Pa. 514.

Mr. Fowkes, being called as a witness by the defendant, testified to the effect that he sold Anderson a paint plant for three thousand dollars, one-half of which was to be paid in cash and the balance by a transfer to the witness of Jack Bros.' note of \$1,500; and that the mortgage was assigned to him as security for the payment of the three thousand dollars, which included the money and the note, and all to be paid at the maturity of the note in 1900; with the express agreement that if not so paid the assignment of the mortgage was to be absolute; and that no part of said three thousand dollars, either the note or the money, was paid. The witness also testified that he had endorsed the note and discounted it at the National State Bank of Camden, New Jersey; and that it was later paid in whole or in large part from the proceeds of a life insurance policy, which he had assigned to the bank as security for that and other indebtedness. The defendant claimed surprise at the testimony of this witness and was permitted to offer in evidence prior statements of Mr. Fowkes to the effect that the mortgage was assigned to him as collateral to the Jack Bros.' note without more. These statements at most were only competent to neutralize the evidence of the witness and not as substantive evidence. There was no proof that the mortgage was ever paid, and the assignment thereof to Fowkes was absolute on its face; aside from his testimony there was nothing to show Anderson was indebted to him or that the assignment of the mortgage was in any sense as collateral security. So, but for Fowkes's testimony, the right to recover on the mortgage was undoubted; and, being defendant's own witness, his testimony must be taken as a whole. Defendant cannot select what suits him and reject the balance. There is no other evidence on that question

and the contract must stand as the witness proved it or not at all. In that light it did not constitute a defense to the action on the mortgage, as by the terms of the agreement the mortgage became the absolute property of Fowkes when no part of the three thousand dollars was paid at the maturity of the note.

Defendant here contends that despite such agreement the mortgage was still held subject to the right of redemption by the assignor. But that question does not seem to have been raised in the court below, and, if not, cannot be considered here: *Lindsay v. Dutton*, 227 Pa. 208; *Beaver Boro. v. Beaver Valley R. R. Co.*, 217 Pa. 280; *National Bank of Chester Co. v. Thomas*, 220 Pa. 360. And, aside from that, as the mortgage was never paid nor any offer made to redeem it, we see no valid reason why it could not be foreclosed at the instance of the use-plaintiff. Anderson could not satisfy the mortgage after he had assigned it to Fowkes, nor by an agreement to do so affect the rights of the latter. The evidence of Fowkes that he had paid the Jaek Bros.' note or at least the larger part of it, being undisputed, the fact that defendant recently obtained a transfer of the note would not in any aspect of the case enable him to interpose it as a defense to the mortgage, for there is no evidence to show what amount if any is still unpaid upon the note. It does not seem necessary to refer separately to the other questions raised in the record.

The assignments of error are overruled and the judgment is affirmed.

First National Bank, Appellant, v. Gitt and Delone.

Partnerships—Existence of partnership—Evidence—Insufficiency—Going business—Assignment to alleged partners—Status of Assignees—Trustees—Assignment for creditors—Accounting—Commissions—Tenants in common—Sharing of profits—Promissory notes—Nonsuit.

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1. A division of the product of property between tenants in common does not make them partners, although they may have contributed labor or money to raise it.

2. In an action on promissory notes against two defendants as copartners it appeared that the owner of a going business entered into a written agreement with the defendants under which he turned over his entire estate to them for the purpose of administration; that they were to convert the property into cash and apply the proceeds first to the payment of the claims of creditors, then to the payment of an annuity to the assignor, then to other purposes specified; and that defendants were to retain for themselves the residue which might be left after such payments had been made. It did not appear that any profits were made, or that the business was carried on for that purpose or that there was any understanding between the defendants as to the sharing of profits, or that they held themselves out as partners to the plaintiff. The notes in question were given by one defendant and represented an old indebtedness of the assignor's business, such defendant endorsing the notes in the business name and individually. The other defendant had nothing to do with the negotiation of the notes. *Held*, the defendants were not partners but trustees, and a compulsory nonsuit was properly entered as to the defendant who did not endorse the note.

3. The transaction was in the nature of an assignment for the benefit of creditors, involving an accounting; the residue representing commissions of the assignees.

Argued May 14, 1917. Appeal, No. 234, Jan. T., 1916, by plaintiff, from judgment of C. P. York Co., Jan. T., 1915, No. 106, refusing to take off compulsory nonsuit in case of First National Bank of Hanover, Pennsylvania, v. H. N. Gitt and Charles J. Delone, Trading and doing business as S. L. Johns Cigar Company. Before BROWN, C. J., POTTER, STEWART, MOSCHISKER and WALLING, JJ. Affirmed.

Assumpsit on two promissory notes. Before Ross, J. The facts appear by the opinion of the Supreme Court.

The lower court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

Error assigned, among others, was in refusing to take off nonsuit.

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Henry C. Niles, with him *Michael S. Niles*, *Charles A. May* and *George E. Neff*, for appellant.—One who is entitled to a share of the profits arising from joint property, is by operation of law the partner of the other joint owner and is liable upon an obligation incurred by the other in regard to the joint business with the joint property: *Purviance v. McClintee et al.*, 6 S. & R. 259; *Edwards v. Tracy*, 62 Pa. 374; *Caldwell v. Miller*, 127 Pa. 442; *Righter v. Farrel*, 134 Pa. 482; *Wessels & Co. v. E. Weiss & Co.*, 166 Pa. 490; *Bradly v. Jennings*, 201 Pa. 473.

Right to division of profits constitutes partnership: *Simpson v. Summerville*, 30 Pa. Superior Ct. 17.

V. K. Keesey, for appellees.—Even if defendants be considered common owners of the property, subject to certain charges, they could convert it into cash without incurring the liability of partners: *Butler Savings Bank v. Osborne*, 159 Pa. 10; *Taylor v. Fried*, 161 Pa. 53; *Walker v. Tupper*, 152 Pa. 1; *Denithorne v. Hook*, 112 Pa. 240.

Defendants were not partners but cotrustees: *Ahl's App.*, 129 Pa. 26.

The relationship of mutual agency does not exist among cotrustees: *Graham's Est. (No. 1)*, 218 Pa. 344.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

This is an appeal from the refusal of the court below to take off a judgment of compulsory nonsuit. The action was assumpsit brought to recover from the defendants, as partners, the amount of two certain promissory notes made by L. M. Long & Co. to the order of S. L. Johns Cigar Company, and endorsed in that name by H. N. Gitt, and by H. N. Gitt personally. In plaintiff's statement of claim it was averred that, on the dates of the notes in question, "H. N. Gitt and Charles J. Delone were copartners, trading and doing business under the name of S. L. Johns Cigar Company," and that the notes

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"were taken, endorsed and delivered to the plaintiff in and about the business of the said copartnership of H. N. Gitt and Charles J. Delone, trading and doing business as S. L. Johns Cigar Company, and for the benefit and in the business of the said copartnership."

The defendant Gitt made no defense to plaintiff's demand, but Charles J. Delone filed an affidavit of defense, in which he denied that he was a copartner with Gitt, or had traded as S. L. Johns Cigar Company, or was in any way liable on the notes in suit.

Upon the trial, at the close of plaintiff's evidence, the court entered judgment of compulsory nonsuit, upon the ground that no partnership had been made out, and no liability upon the part of Delone had been established. Plaintiff has appealed, and its counsel contend that the evidence offered was sufficient to establish the fact that the defendants purchased property which they employed for their mutual profit, and that the obligations, upon which this action was brought, were incurred in the management of a business from which they were jointly entitled to the net profits, and in which, it is argued, they were, therefore, partners.

In an article of agreement which was offered in evidence, it was set forth that, being desirous of relief from the cares growing out of the involved condition of his business affairs, S. L. Johns, upon the conditions named, turned over his entire estate to Gitt and Delone for the purpose of administration. They were to convert the property into cash as in their judgment should be advisable. The proceeds were to be applied, first in payment of the claims of creditors, then in payment of an annuity to Johns for ten years, and after that the fixed sum of \$40,000 was to be paid to him. In addition they were to pay to Johns or his heirs such sum as should be necessary to acquire a clear title to his residence and contents, and to a certain farm property with stock and implements. Provision for the payment of certain other sums was also made, and if Gitt and Delone succeeded in

these undertakings, they were to retain for their own use "all the proceeds and property remaining after the above provisions have been complied with." It thus appears that, while Johns made an absolute conveyance of his property to Gitt and Delone, they took it only for the purpose of liquidation, and subject to the payment of all the indebtedness of Johns, and of the various other sums specified. They were to have for themselves only the residue which might be left after those payments were made. A division of the product between tenants in common does not make them partners, although they may have contributed labor or money to raise it. No presumption of partnership arises from the mere fact of cotenancy: *Taylor v. Fried*, 161 Pa. 53. The defendants in this case were clearly trustees of the property and were liable to account as such: *Ahl's App.*, 129 Pa. 26. We find nothing in the agreement which expressly constitutes the defendants actual partners, and the record is bare of evidence tending to show that they ever held themselves out to the public as such, nor does it appear that the plaintiff in this case extended credit to them as partners. The testimony shows that the notes in question represented old indebtedness of L. M. Long & Co. to the cigar company. All the negotiations with the bank were conducted by H. N. Gitt, who endorsed the notes, signing the name of S. L. Johns Cigar Company, and also endorsing as an individual. The defendant Delone had nothing to do with the negotiation of the notes. The agreement discloses no intention that the business should be carried on for the purpose of making profits nor does it appear that any were realized. It was only after the indebtedness of Johns had been discharged, and the various sums specified had been paid, and the plan had been successfully carried out by Gitt and Delone, that they were to retain whatever money remained in their hands, as compensation for their services. Such a sum could not fairly be regarded as the profits of a business venture. More properly speaking, it

would be residue derived from the corpus of the assigned estate, as the entire transaction was in the nature of an assignment for the benefit of creditors, with the compensation of the assignees dependent upon the skill and ability displayed in settling the affairs of the estate.

In their argument, counsel for appellant make specific complaint of the action of defendant Delone in retaining certain shares of telephone company stock which were obtained as partial security upon the indebtedness of L. M. Long, evidenced in part by the notes in question. We do not see, however, that this has anything to do with the question of partnership. Under the agreement, it was the duty of Gitt and Delone to collect this indebtedness, as well as all other sums due to Johns, and as trustees they are liable to account to Johns, and perhaps to his creditors, for the moneys they received. But in the present suit the effort is to hold them as partners, and not as trustees. Our examination of the record leads us to agree with the conclusion of the court below that the evidence does not show that there was any understanding between Gitt and Delone as to any sharing of profits, nor does it appear that Delone in any way gave plaintiff reason to believe that any partnership existed between Gitt and himself. The nonsuit was properly entered, and the refusal to take it off was justified.

The judgment is affirmed.

Fetrow's Estate.

Wills—Construction—Gift to class—Vested and contingent remainders—"Surviving"—"Survivors"—Time for determination of class—Equity of distribution—Avoiding intestacy.

1. It is a general rule of construction that the word "survivor" or "surviving" following a prior gift is understood as referring to the death of the testator, unless a contrary intention is apparent.

2. Where a testator directed that the proceeds of his real estate,

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in which he devised a life interest to a named devisee, should "be equally divided among the surviving devisees named in this will or their legal representatives," he intended that the recipients of his bounty should be the devisees who were living at the time of his own death, and did not restrict the class to those who should survive the life tenant.

3. In such case, the reasonable interpretation of the words "surviving devisees or their legal representatives" is to refer the word "surviving" to testator's death and to construe "or their legal representatives" (whether meaning executors and administrators, heirs or next of kin) as intended to prevent the lapse of the share of any legatee who might die before the time for distribution should arise.

4. This interpretation avoids intestacy and secures equality of distribution among the legatees.

Argued May 14, 1917. Appeal, No. 97, Jan. T., 1917, by Amelia J. Rupp, from decree of O. C. York Co., sustaining exceptions to report of Auditor in estate of Joshua Fetrow, deceased. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Reversed.

Exceptions to report of auditor. Before WANNER, P. J.

The facts appear by the opinion of the Supreme Court.

The lower court sustained exceptions to the report of the auditor. Amelia J. Rupp appealed.

Error assigned, among others, was in sustaining exceptions to the auditor's report.

George Hay Kain, of Cochran, Williams & Kain, with him E. Philip Stair and David P. Klinedinst, for appellant.—"Survivor" or "surviving" refers to the death of the testator and not to the death of the life tenants: *Johnson v. Morton*, 10 Pa. 245; *Passmore's App.*, 23 Pa. 381; *Ross v. Drake*, 37 Pa. 373; *McVey v. Latta*, 4 W. N. C. 524; *Barker's App.*, 1 Sadler (Pa.) 324; *Shallcross's Est.*, 200 Pa. 122; *Black v. Woods*, 213 Pa. 583.

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The law favors vested rather than contingent estates, and, unless it clearly appears from the context or the circumstances of the case that a contingent interest was intended, the remainder will be regarded as vesting at the death of the testator and not at the expiration of the life tenancy: *Bache's Est.*, 246 Pa. 276; *Tatham's Est.*, 250 Pa. 269; *Hood v. Maires*, 255 Pa. 128; *Bair's Est.*, 255 Pa. 169.

A will must be construed so that each clause may take effect if possible. No part will be rejected as repugnant if any fair and reasonable construction can be given to the whole which will render each part effective: *Finney's App.*, 113 Pa. 11.

The term "or their legal representatives" prima facie means executors and administrators: *Osborn v. First National Bank*, 175 Pa. 494; *Garrett's Est.*, 248 Pa. 199.

The use of the words "or their legal representatives" indicates the testator's intention that the legacies should vest at his death: *Muhlenberg's App.*, 103 Pa. 587; *Patterson v. Hawthorne*, 12 S. & R. 112; *King v. King*, 1 W. & S. 205; *Buckley's Admr. v. Reed*, 15 Pa. 83; *McGill's App.*, 61 Pa. 46.

Jacob E. Weaver, with him *Donald H. Yost*, for appellees.—The modern rule of construction is that if there is no previous interest given in the legacy, the period of division is the death of the testator, and the survivors on his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and survivors at such death will take the whole legacy: *Reiff's Est.*, 124 Pa. 145; *Woelpper's App.*, 126 Pa. 562; *Mulliken v. Earnshaw*, 209 Pa. 226; *Anderson's Est.*, 243 Pa. 34; *O'Donnell's Est.*, 252 Pa. 45.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

Joshua Fetrow died February 25, 1864, leaving a will which contained the following provisions: "I give, de-

vise and bequeath unto Lucinda Dietz widow of Daniel Dietz deceased, now living with me during her natural life, the House and land situate in said Spring Garden Township, adjoining the Codorous Navigation, Loucks Mill road and lands of Daniel Immel and Alexander Hay and being the same premises lately occupied by Joseph Sample. She to have and hold the same and keep it in repair during her natural life at her death the same to be sold and the proceeds thereof to be equally divided among the surviving devisees [devisees] named in this will or their legal representatives."

Lucinda Dietz, who subsequently married John Rutter, died December 15, 1914, and the property devised to her for life was sold by George A. Fetrow, administrator d. b. n. c. t. a. of Joshua Fetrow.

The question, here in controversy, is whether, when the testator directed that the proceeds of the real estate in which he devised a life interest to Lucinda Dietz should "be equally divided among the surviving devisees named in this will or their legal representatives," he intended that the recipients of his bounty should be the devisees who were living at the time of his own death, or those only who would survive the life tenant. The auditor held that he intended the former, while the court below was of opinion that the latter was intended. In the one case the legacies would vest at the death of testator, and in the other at the death of the life tenant. As only one of the devisees, Michael Fetrow, survived the life tenant, the court below held that he took the entire fund and awarded it to his executors. This appeal was taken by Amelia J. Rupp, a legal representative of a devisee who died after the death of the testator but before the death of the life tenant.

The general rule in Pennsylvania is, and always has been, that the word "survivor" or "surviving" following a prior gift, is understood as referring to the death of the testator, unless a contrary intention is apparent: Shallcross's Est., 200 Pa. 122; Woelpper's App., 126 Pa.

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562; *Ross v. Drake*, 37 Pa. 373. We find nothing in the will of Joshua Fetrow which discloses an intention that the words "surviving devisees" are to apply to a period other than that of testator's death. In order to make them apply to the period of the life tenant's death, the court below inserted the additional word "then." But that word is not found in the will, in that connection. It also became necessary practically to ignore the words "or their legal representatives." It is true that the court suggests that these words were intended to provide an alternative distribution of the fund in the event of all the legatees named in the will dying before the death of the life tenant. But the result of such a construction is that in case one of the legatees survived the life tenant, which actually occurred, the words "or their legal representatives" are given no effect whatever.

We think the reasonable interpretation of the phrase "surviving devisees or their legal representatives," is to refer the word "surviving," in accordance with the rule, to testator's death and construe "or their legal representatives" (whether meaning executors and administrators, heirs or next of kin), as intended to prevent the lapse of the share of any legatee who might die before the time for distribution should arrive. The court admits that the words must have been given that meaning, if all the legatees had died before the date of the life tenant's death. It is not probable that the testator intended that, if none of the legatees should live to share in the fund, the legal representatives of all should take, but, if one only should survive, the legal representatives should all be excluded. We think the construction adopted by the auditor was in accordance with testator's intention. If "surviving" refers to the death of the life tenant, as was held by the court below, then the death of Michael Fetrow during the life tenancy would have created an intestacy. The interpretation placed upon the phrase by the auditor avoids intestacy and secures equality of distribution among the legatees. We think

the testator evidently intended that the proceeds arising from the sale of the property should be divided among certain persons, who were definitely determined by his will as construed in Fetrow's Est., 58 Pa. 424, and the legal representatives of such of them as predeceased the life tenant.

The assignments of error are all sustained, the decree of the court below is reversed, and the record is remitted that distribution may be made in accordance with the report of the auditor.

Bruggeman et al. v. City of York, Appellant.

Negligence—Municipalities—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing of wire in mud with broom—Splashing of mud—Injury to eye—Proximate cause—Court and jury—Judgment for defendant n. o. v.

1. A proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of. A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury.

2. The injury must be the natural and probable consequence of the negligence; such a consequence as under the circumstances might and ought to be foreseen by the wrongdoer as likely to flow from his acts.

3. The facts being undisputed the question of proximate cause is for the court.

4. In an action against a municipality to recover damages for personal injuries it appeared that the defendant had raised the grade of a lot causing water and mud to overflow plaintiff's sidewalk; that plaintiff, while sweeping off the sidewalk, in an effort to remove a coil of wire which had become lodged in the pavement or gutter pushed it with her broom so that it sprang back and sent a splash of the street mud into her eye, causing the loss of the sight thereof. *Held*, the pushing of the coiled wire and not the

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presence of the mud was the proximate cause of the accident and judgment was entered for the defendant non obstante veredicto.

Argued May 15, 1917. Appeal, No. 129, Jan. T., 1917, by defendant, from judgment of C. P. York Co., August Term, 1914, No. 125, on verdict for plaintiff in case of Mary Ellen Bruggeman and John B. Bruggeman v. City of York. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Reversed.

Trespass for personal injuries. Before ROSS, J.

The facts appear by the opinion of the Supreme Court.

Verdict for the plaintiff Mary Ellen Bruggeman for \$2,500 and for the plaintiff John B. Bruggeman for \$100. Defendant appealed.

Error assigned, among others, was in refusing defendant's motion for judgment n. o. v.

John L. Rouse, City Solicitor, for appellant.—It is clear that the existence of the mud of itself could not have caused the injury, and that plaintiff's act in sweeping the mud in and by itself could not have caused it, and the muddy condition of the street was therefore not the proximate cause of the accident. The proximate cause of an event is that which in a natural and continuous sequence unbroken by any new cause produces the event: *Nirdlinger v. American District Telegraph Co.*, 245 Pa. 453; *Herr v. City of Lebanon*, 149 Pa. 222; *March v. Giles*, 211 Pa. 17; *Swanson v. Crandall*, 2 Pa. Superior Ct. 85.

Henry C. Niles, with him *Michael S. Niles*, *Charles A. May* and *George E. Neff*, for appellees.—The negligent accumulation of the mud was the proximate cause of plaintiff's injury: *Glasgow v. Altoona*, 27 Pa. Superior Ct. 55; *Fischer v. Sanford*, 12 Pa. Superior Ct. 435.

The wrongful act and its injurious effect was connected by an unbroken and continuous succession of

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events: *Gudfelder v. Pittsburgh*, Cin., Chgo. & St. Louis Ry. Co., 207 Pa. 629; *Thomas v. Central R. R. Co. of N. J.*, 194 Pa. 511; *King v. Lehigh Val. R. R. Co.*, 245 Pa. 25; *Penna. R. R. Co. v. Hope*, 80 Pa. 373; *Sturgis v. Kountz*, 165 Pa. 358.

OPINION BY MR. JUSTICE WALLING, June 30, 1917:

This is an action for personal injuries resulting, as alleged, from an accumulation of filth in a public street. In 1912, defendant city built the Eagle Engine House on a lot located on the west side of Jessop Place, between Jackson street and Rose alley in said city, and in so doing raised the grade of the lot, and to make a convenient roadway thereto filled up the brick gutter on the north side of the property. The land descended to the west and raising the grade of the lot and stopping up the gutter caused the water in wet weather to overflow the street and make a large pool sometimes covering parts of the adjoining lots, especially plaintiffs' lot located on the northeast corner of Jessop Place and Rose alley. The gutter extended from the east down Rose alley across Jessop Place, and seemed to be in the nature of an open sewer; for when the stagnant water, caused by the filling of the lot and gutter as above stated, would evaporate, germ laden filth with foul odors would be there found. This would seem to have constituted a nuisance, which the defendant, although having notice, failed to abate until after the occurrence in question.

On October 21, 1912, the plaintiff, Mrs. Bruggeman, took a broom and went out to clean up some of the filth so deposited in the alley in front of her home, and, in an effort to remove a coil of wire which had become lodged in the pavement or gutter, she pushed it with the broom so that it sprang back and in so doing sent a splash of the street mud into her face and left eye, thereby causing, as the jury found, the loss of the sight thereof. There was nothing to indicate that defendant was in any man-

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ner responsible for the presence of the wire in the street. The trial judge submitted the case to the jury, including the questions of negligence, proximate cause, etc. The jury found for the plaintiffs and the court overruled defendant's motion for judgment non obstante veredicto and entered judgment on the verdict; hence this appeal.

In our opinion defendant's motion for judgment should have been granted on the ground that the negligence complained of was not the proximate cause of plaintiff's injury. "A proximate cause, in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred": 21 American and English Encyclopedia of Law (2 Ed.) 485. "A proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of": *Behling v. Southwest Penna. Pipe Lines*, 160 Pa. 359. "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury": 29 Cyc. 496. Here the foul mud in the street was the condition and perhaps remote cause of the injury, but the coiled wire which threw the mud in plaintiff's face, as she pushed it with her broom, was the immediate, unrelated and intervening cause of the accident. The mud was passive, the active agent was the wire when set in motion by the broom, and aside from it the accident would not have happened. We see no difference in principle between mud being thrown by a wire and fire being carried by water, and in the latter case the water was the intervening cause: *Hoag & Alger v. Lake Shore & Michigan Southern R. R. Co.*, 85 Pa. 293; as was the fall from the ladder, and not the exposed live electric wire, in *Elliott v. Allegheny County*

Light Co., 204 Pa. 568; and as was the breaking of the traces and not the want of a guard rail, in *Willis v. Armstrong County*, 183 Pa. 184. Such intervening cause may be either animate or inanimate; and where two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause: *Herr v. City of Lebanon*, 149 Pa. 222. The act of a child may be the proximate cause: *Rhad v. Duquesne Light Co.*, 255 Pa. 409; *Swanson v. Crandall*, 2 Pa. Superior Ct. 85. The final result here cannot be said to be the natural and probable result of defendant's negligence. See *King v. Lehigh Valley R. R. Co.*, 245 Pa. 25.

The rule is well settled "that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to be foreseen by the wrong doer as likely to flow from his acts": *Swanson v. Crandall*, *supra*. Such an injury as is here complained of could not be foreseen as a result of permitting mud and filth to remain in a roadway; nor could it be foreseen that any personal injury would result therefrom to a person upon the sidewalk. The immediate cause here was not set in motion by the original wrong doer, nor was it the result of an unbroken succession of events, or of concurring causes.

The facts being undisputed the question of proximate cause is for the court: *Douglass v. N. Y. Central & Hudson River R. R. Co.*, 209 Pa. 128; *South Side Pass. Ry. Co. v. Trich et ux.*, 117 Pa. 390. We do not deem it necessary to decide whether a municipality is liable for personal injuries resulting from the unsanitary condition of its streets.

The judgment of the court below is reversed and is here entered for the defendant.

Vandersloot v. Pennsylvania Water & Power Company, Appellant.

Equity jurisdiction—Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 13, 1856, P. L. 568; March 17, 1856, P. L. 388; April 6, 1859, P. L. 389; April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847—Equity Rule 10—Construction of dam—Overflowing of waters—Dam partly in another county—Bill by riparian owner—Relief affecting entire dam—Relief in personam.

1. It is against the policy of the jurisprudence of this State to bring nonresidents within the jurisdiction of our courts unless in very special cases, and the Act of April 6, 1859, P. L. 389, providing that any court having equity jurisdiction may upon due application authorize service outside the jurisdiction of the court in any suit "concerning.....lands, tenements and hereditaments situated or being within the jurisdiction of such court," is to be construed in harmony with such policy.

2. Service of a bill in equity outside of the jurisdiction of the court in which it is filed cannot properly be allowed under the authority of the Act of 1859, where the prayers for relief are not confined entirely to property alleged to be within the jurisdiction of the court, and where the relief, if granted, would require a decree against the defendant personally.

3. A bill in equity brought in York County against a Pennsylvania corporation to compel the removal of a dam which was partly in York County and partly in Lancaster County, and which was alleged to cause waters to overflow complainant's land in York County, was, by leave of the York County court, served on officers of the defendant in New York, where the company's principal office was located, and in Lancaster County, where its mills were situated. The prayers of the bill comprehended relief affecting the entire dam of the defendant, and also relief requiring a decree against the defendant personally. *Held*, the service was not within the authority of the Act of 1859, or other statutory authority, and a rule to set it aside should have been made absolute.

4. In such case there was no merit in the contention that the service was authorized under Equity Rule 10, which merely provides that "service of the bill and notice to appear and answer on a corporation shall be effected in the mode prescribed by law for the service of a writ of summons upon such corporation." The

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Acts of June 13, 1836, P. L. 568; March 17, 1856, P. L. 388; April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847, do not apply.

Practice, Supreme Court and C. P.—Appeal from order refusing to set aside service—Conditional appearance—Waiver by defense on merits.

5. In such case the defendant may appeal from an order refusing to set aside the service where it has entered a conditional appearance for the purpose of taking such rule, or may defend the action on its merits. He is required to select one of the two courses, and is bound by the legal consequences of the course selected.

Argued May 15, 1917. Appeal, No. 132, Jan. T., 1917, by defendant, from decree of C. P. York Co., Oct. T., 1916, No. 1, refusing to set aside service of bill in equity in case of John Edward Vandersloot v. Pennsylvania Water & Power Company. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Reversed.

Rule to set aside service of bill in equity. Before ROSS, J.

The facts appear by the opinion of the Supreme Court.

The lower court dismissed plaintiff's rule to set aside the service of the bill. Defendant appealed.

Error assigned was the decree of the court.

J. E. Malone, with him *Stewart & Gerber*, for appellant.—The ordinary jurisdiction of a court of equity is confined to the county unless such jurisdiction is enlarged by statute: *Hays v. Penna. R. R. Co.*, 17 Pa. 9.

A bill to be within the purview of the Act of 1859 must be confined, at least so far as the nonresident defendant is concerned, to a prayer for a decree affecting only the property within the jurisdiction of the court: *Eschbach v. Slonaker & Krause*, 1 Pa. D. R. 32.

The Act of 1859 is ineffectual to render valid extra-territorial service of process in proceedings in personam: *Wallace v. United Electric Co.*, 211 Pa. 478.

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Defendant's dam being located in another county the present case is not one concerning lands within the jurisdiction of the court, so as to authorize service upon a nonresident of the county under the Act of 1859: *Mengel v. Lehigh Coal & Navigation Co.*, 24 Pa. C. C. 152.

Henry C. Niles, with him *Michael S. Niles*, *Charles A. May* and *George E. Neff*, for appellees.—In testing the propriety of an order and service of process under the Act of 1859, the allegations of the bill are to be considered: *Vail v. Osburn*, 174 Pa. 580; *Martin's App.*, 13 W. N. C. 167.

Service on the defendant in New York was proper: *Eby's App.*, 70 Pa. 311; *Coleman's App.*, 75 Pa. 441; *Mengel v. Lehigh Coal & Navigation Co.*, 24 Pa. C. C. 152; *Martin's App.*, 13 W. N. C. 167.

Service at defendant's office in Lancaster County was proper: *Bailey v. Williamsport & North Branch R. R. Co.*, 174 Pa. 114; Rule 10 Supreme Court Equity Rules.

OPINION BY MR. JUSTICE MOSCHZISKE, June 30, 1917:

The defendant, a corporation under the laws of Pennsylvania, possesses and operates a dam across the Susquehanna river. The plaintiff filed a bill in equity, alleging that this obstruction backs the water upon certain property owned by him in York County, where, he averred, one end of the dam is located. The bill prayed, (1) That defendant be ordered to remove the dam and certain obstructions connected therewith, "or such parts thereof as shall allow the water of said river to flow and run in its usual and natural course. . . . as it did before the erection, maintenance and operation of said dam, structures and works of the defendant"; (2) That defendant be restrained from increasing the height of its dam; (3) "That defendant be enjoined from maintaining and operating its said dam and works or other obstructions in said river. . . . in such manner as shall

cause the water thereof to back and overflow the property of the plaintiff"; (4) "That defendant be perpetually enjoined from placing and maintaining any dam, structure or works.....as shall increase the depth of the water.....thrown or flowing upon plaintiff's said property"; (5-7) That defendant be enjoined from flooding certain roads, tow-paths, banks, etc., claimed to be the property of plaintiff; (8) That an account be taken of the damages suffered by plaintiff, and defendant be "decreed to pay the same"; (9-11) "Discovery, general relief," etc.

The defendant's mill and works are located in Lancaster County, where it maintains an office; but its headquarters are in New York City. On the day the bill was filed, plaintiff petitioned for an order allowing service on defendant outside the jurisdiction of the Common Pleas of York County; whereupon the court below decreed "that service of the bill be made upon.....the defendant in the manner directed by the Act of April 6, 1859." The sheriff returned that he had made such service on the president and secretary of the corporation at its office in New York City. On September 13, 1916, the sheriff of York County deputized the like officer of Lancaster County to make service in the latter's jurisdiction; and, on September 16, 1916, the last mentioned sheriff made return that he had served the bill, etc., on "the agent of defendant and the person for the time being in charge of its office" in Lancaster County. September 28, 1916, counsel for defendant entered an appearance *de bene esse*, for the purpose of attacking these two returns. The court below dismissed a motion to set aside the service, stating, *inter alia*, "the plaintiff's bill contains the only facts upon which the court can yet rely; and an inspection thereof clearly reveals a sufficient subject-matter within the jurisdiction of this court to warrant the court in authorizing process of service on the defendant in accordance with the provisions of the Act of April 6, 1859, P. L. 389, Sec. 1..... It

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might be that facts or matters would be revealed by regular and legal investigation which would render the jurisdiction of this court nugatory; but, until..... properly shown, we cannot assume.....that any such conditions exist." The defendant has appealed.

The Act of 1859, *supra*, provides that any court of the Commonwealth having equity jurisdiction may upon due application authorize service outside the jurisdiction of such court, in any suit "concerning.....lands, tenements and hereditaments.....situated or being within the jurisdiction of such court....." In *Coleman's App.*, 75 Pa. 441, 443, 457, 458, the averments of the bill related to property both within and outside the jurisdiction of the court, and it prayed, (1) That a certain company defendant "transfer to plaintiff ninety-eight shares of its stock" (being the property within the jurisdiction); (2) That one Walton Dwight (the principal defendant) account and pay to plaintiff a designated sum of money; (3) That two other persons be made defendants; (4) General relief. The court below set aside service upon the defendant Dwight, had under the Act of 1859, *supra*, and on appeal we affirmed, saying: "It has not been the policy of our jurisprudence to bring nonresidents within the jurisdiction of our courts unless in very special cases.....The Act of 1859 ought, therefore, to receive a construction in harmony with this policy. There exists no good reason why courts of equity should be invested with a more enlarged jurisdiction against nonresidents than courts of law. On the contrary.....the inclination should be in a different direction.....Had the bill in this case been confined to the prayer for relief as to the ninety-eight shares of the capital stock of the Williamsport and Canada Lumber Company, standing upon their books in the name of the defendant Walton Dwight, there would be plausible ground upon which to sustain the service of the process upon him.....We are of opinion that the bill must be confined, at least so far as the interest of the foreign de-

fendant is involved, to a prayer for a decree affecting only the property in question. If it goes further and asks for relief by a decree against the defendant, personally, ... it is not a case within the purview of the act, and the court has no authority to direct service of process upon the defendant."

In the case at bar, it will be observed that the prayers for relief are not confined to property alleged to be within the jurisdiction of the court; but, on the contrary, they comprehend relief affecting the entire dam of defendant, extending into the river beyond the limits of York County, and also relief which, if granted, would require a decree against the defendant personally. On this state of facts, under the authority just cited, the present is not a case for service in accordance with the Act of 1859, *supra*; and the court below erred when it determined otherwise.

The plaintiff contends, however, that, since our equity Rule 10 provides that "service of the bill, and notice to appear and answer, on a corporation shall be effected in the mode prescribed by law for the service of a writ of summons upon such corporation," the service by the deputized sheriff of Lancaster County is good and sufficient in this case, without regard to that had under the Act of 1859 (citing Sec. 42 of the Act of June 13, 1836, P. L. 568; Act of March 17, 1856, P. L. 388; Act of July 9, 1901, P. L. 614, as amended by the Act of April 3, 1903, P. L. 139; and the Act of June 5, 1915, P. L. 847); but there is nothing in Rule 10, or any of the acts of assembly relied upon by plaintiff, which confers the right upon a court in equity to bring a corporation, which otherwise would be without its jurisdiction, within the grasp of its process, so as to subject such defendant to a decree in personam or one affecting its property located in another county. We have examined the cases cited by plaintiff, but none of them supports the order appealed from.

The question of the right to take the present appeal

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was also argued before us. In *McCullough v. Railway Mail Asso.*, 225 Pa. 118, 124, 123, a rule to set aside service of a summons was discharged; whereupon defendant went to trial. The verdict favored plaintiff, and defendant appealed, assigning as error, *inter alia*, the discharge of the before-mentioned rule; but we said: "The defendant association entered a conditional appearance for the purpose of moving to set aside the service of the summons.....After the court had refused the motion, the association.....entered a plea in the case; this action must be regarded as.....a waiver of any irregularity or insufficiency in the service of the writ." While we dismissed the assignment in question, as not calling for an actual ruling upon the situation which it sought to bring before us, yet we discussed at large the principles of law and practice involved; and during the course of that discussion we held that, if a defendant's motion to set aside the service of the writ against him be refused, "he may rely upon the position he has taken and attempt to sustain it by an appeal to the proper appellate court, or he may consider himself in court and defend the action on its merits," adding, "He is required to select one of the two courses, and having done so he must accept the legal consequences of his action. He cannot deny the jurisdiction of the court, and at the same time take such action to defeat the plaintiff's claim as will amount to an appearance." Under this authority, which is our latest utterance upon the subject, the defendant had a right to appeal from the order here complained of.

If the procedure determined upon by the court below were followed, and this case set for trial on the merits, so that, incidentally, it might be ascertained whether facts would develop "which would render the jurisdiction of the court nugatory," then, under the principles laid down in *McCullough v. Railway Mail Asso.*, *supra*, if the defendant should appear and defend, it would be in court for all purposes, and a decree in personam could

be entered against it; which decree would be enforceable by proceedings in contempt, despite the provisions of Section 3, Act of 1859, *supra*, that no such process should issue thereunder. The learned court below fell into error by relying exclusively upon the averments of the bill, and failing to take into account the controlling importance of the prayers for relief (Coleman's App., *supra*); when the latter are kept in mind, without the need for further light upon the subject, it becomes clear that the attempt to secure jurisdiction under the Act of 1859 was "nugatory," and that the rule to avoid the service made upon defendant should have prevailed.

The assignment of error is sustained, the order of the court below reversed, and service of the bill set aside; appellee to pay the costs.

Corbin et al. v. Millers Mutual Fire Insurance Company of Harrisburg, Penna., Appellant.

Fire insurance—Application—Answers to questions—Misrepresentations—Flour mill—Character of power used—Inspection—Breach of warranty—Estoppel—Judgment for defendant n. o. v.

1. In an action on a fire insurance policy covering a flour mill operated by water power with a gasoline engine as auxiliary power, a verdict should have been directed for the defendant where it appeared that to specific questions in the application plaintiff answered that only water power was used; that while defendant's secretary actually inspected the premises and saw the gasoline engine the application was not received by him until several months thereafter, and that before the policy was issued he communicated with the plaintiff stating that an additional rate was chargeable if gasoline power was also employed, and that with full knowledge of the difference in the rates plaintiff remitted the premium chargeable if water power only was used.

2. In such case the company was justified in inferring from applicant's written declaration and from the payment of the lower premium that only water power was used, that plaintiff intended to represent that the use of the gasoline engine in operation at the time of the inspection by defendant's secretary had been aban-

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done, and defendant was not estopped by reason of such inspection from setting up the breach of warranty of the truth of plaintiff's answers to the questions in the application.

Argued May 15, 1917. Appeal, No. 251, Jan. T., 1916, by defendant, from judgment of C. P. Mifflin Co., May T., 1915, No. 107, on verdict for plaintiffs in case of C. G. Corbin and R. M. Sassaman trading as High Falls Milling Company v. Millers Mutual Fire Insurance Company of Harrisburg, Pennsylvania. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Reversed.

Assumpsit on a fire insurance policy. Before BAILEY, P. J.

The facts appear by the opinion of the Supreme Court.

Verdict for plaintiff for \$3,714.08 and judgment thereon. Defendant appealed.

Errors assigned, among others, were in refusing to direct a verdict for defendant (2), and in refusing defendant's motion for judgment n. o. v. (4).

Rufus C. Elder, for appellant.—The misrepresentation as to the character of the power used in plaintiff's mill rendered the policy void: *United Brethren Mutual Aid Society of Penna. v. White*, 100 Pa. 12; *Wall v. Royal Society of Good Fellows*, 179 Pa. 355; *Blooming Grove Mutual Fire Ins. Co. v. McNerney*, 102 Pa. 335; *Home Mutual Life Association of Penna. v. Gillespie*, 110 Pa. 84; *Smith v. Northwestern Mutual Life Ins. Co.*, 196 Pa. 314; *Commonwealth Mutual Fire Ins. Co. v. Huntzinger*, 98 Pa. 41; *March v. Metropolitan Life Insurance Co.*, 186 Pa. 629.

A. Reed Hayes, with him *L. J. Durbin*, for appellees.—Where at the time of the issuing of an insurance policy the company knows or should have known that one of

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the conditions is inconsistent with the facts, and the insured has been guilty of no fraud, the company is estopped from setting up the breach of such condition: *Caldwell v. Fire Association of Philadelphia*, 177 Pa. 492; *Bateman v. Lumberman's Ins. Co.*, 189 Pa. 465; *Damms v. Humboldt Fire Ins. Co.*, 226 Pa. 358; *Clymer Opera Co. v. Flood Mutual Fire Ins. Co.*, 238 Pa. 137; *Central Market St. Co. v. North British & Mercantile Ins. Co. of London*, 245 Pa. 272.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

In this action of assumpsit the plaintiffs sought to recover upon a policy of fire insurance. The defense was breach of warranty. The written application for insurance, presented by plaintiffs, contained the following questions: "Is steam power, water power, or what other power is used?" This was answered, "Water." "If gasoline power is used, then describe the location of the engine, gasoline storage tank, spark igniter, etc." No answer was made to this question. The application contained a warranty of the truth of the answers to all questions and an agreement that they should be incorporated in and form part of the policy to be issued. In addition it was provided that the company should not be bound by any act or statement of its agent, or any statement to such agent, restricting or waiving its rights or varying the written contract, unless it was inserted in the application, endorsed on the policy or otherwise acknowledged in writing by the company's secretary. The property insured was a flouring mill operated by water power, with a sixteen-horse power gasoline engine as auxiliary power. It appeared from the evidence that the gasoline engine was used to a considerable extent after the insurance was obtained, and that it was operated until eleven o'clock on the evening before the fire, which occurred at two o'clock in the morning. The loss admittedly exceeded the amount of the insurance. It was shown that in February, 1914, more than three

months before the insurance was actually placed, the secretary of defendant company visited the mill at the request of plaintiffs with reference to placing fire insurance thereon. At that time he saw that there was a gasoline engine in the mill. After examining the property he left an application blank with plaintiffs, and gave them the rates, one being for water power only, and the other an increased rate for water power and gasoline.

More than three months later, on June 5, 1914, plaintiffs sent, to the office of the defendant company, the application for insurance referred to above. It was not accompanied by a check, and the secretary replied to plaintiffs on June 9, 1914, in part as follows: "From the fact that so much time intervened between my visit to the mill and the filing of the application for insurance, I really forget the basis rate which I named while on the premises. I am inclined to believe, however, that it was \$4.50, and that you had auxiliary power, either gasoline or steam, while in the application you make no mention of any but water power. Therefore, will say that if there is no other than water power, we would be willing to write the insurance on the basis of a cash deposit of \$20 per one thousand dollars insurance and an actual cost of approximately \$18 per one thousand dollars of insurance. A by-law of the company stipulates for prepayment, therefore you should remit the amount of the deposit along with your answer."

The premium for the amount of insurance requested, at the rate named in case water power only was used, was \$740 for the period of five years. If in addition gasoline power was used, the premium would have been \$832.50. According to the by-laws, a cash deposit of ten per cent. of the premium was required. With full knowledge of the difference in the rates, the plaintiffs in reply sent a check for \$75, being one dollar more than the amount of the deposit required for the premium for the use of water power alone. Defendant then sent

them the policy, and a check for one dollar, the excess of the cash deposit.

That there was a misrepresentation as to the use of water power only is admitted. But the trial judge was of opinion that the receipt of the insurance premium by the defendant after its secretary had seen the property, and noted the equipment, was sufficient to estop the defendant from setting up the breach of warranty. We cannot agree with this conclusion. It is true that in February the secretary saw that the mill was equipped with both water power and gasoline engine, and that he then stated the rates for the use of one or both powers. But nothing was done with respect to the insurance until June, and when the application then came in stating that water power alone was in use, the secretary replied by letter, and called attention to that fact, and stated his recollection that applicants had been using auxiliary power, either steam or gasoline, and reminded them that the lower rate was based upon the use of water power alone. Yet in the face of this plain reminder plaintiffs adhered to their statement that water power alone was in use. It was not the equipment with the gasoline engine that increased the hazard, but it was the use of that engine and the accompanying storage of gasoline as fuel for the engine upon the premises that enlarged the risk. The secretary may very well have concluded that when applicants stated in writing that water power only was used, they intended to say that the use of the gasoline engine had been abandoned. That was the only reasonable or natural inference to be drawn from the statement. The use of the power was entirely within plaintiffs' control. They were not bound to continue the use of both water power and gasoline power. They could discontinue the use of either at any time, and the defendant was not bound to discredit the statement made by applicants as to the character of the power in use some three months after the date of the inspection of the premises by defendant's secretary.

We can see in the evidence no basis for the conclusion that the company accepted the application for insurance, knowing at the time that the conditions were not as they were then represented to be by the plaintiffs. The attention of the applicants was called directly to the fact that an increased rate was required if gasoline power was used, and they were given the choice of the two rates, one conditioned upon the use of water power alone, and the other for the use of both water power and the gasoline engine.

Possessed of this knowledge, they allowed their statement to stand that water power only was to be used, and accepted the lower rate of insurance applying to the use of that power alone, and paid the appropriate premium. This action upon their part, if taken in good faith, could only be reconciled with an intention to make no further use of gasoline for auxiliary power. We find nothing in the testimony to indicate that defendant did not implicitly rely upon the warranty. On the contrary, the letter of the secretary plainly shows that it did rely upon it. Defendant said, "if there is no other than water power," etc., it would write the insurance at the rate given, implying, of course, that the use of the auxiliary gasoline power should be abandoned. The only reasonable inference that can be drawn from the testimony is that there was a wilful misrepresentation in the application, and that the use of gasoline power was concealed for the purpose of getting the insurance at the lower rate, which applied to the use of water power alone. Nor are we able to find anything in the evidence which would warrant the inference that when the defendant company received the premium and issued the policy, it had such knowledge of the misrepresentation by plaintiffs as would estop it from setting up the breach of warranty by way of defense.

The second and fourth assignments of error are sustained, and the judgment is reversed, and is here entered for the defendant.

McClintic, Administrator, v. McClintic, Appellant.

Wills—Construction—Definite failure of issue—Life estate—Remainders—"Lawful heirs"—Ejectment—Act of April 27, 1855, P. L. 368.

1. A limitation over by will to persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue.

2. Testator, by will, provided, "I give to my son. . . . the farm on which I now live. . . . and if he should not have any lawful heirs, then after his death, the farm to be sold and divided equally between" six of testator's grandchildren. The son had two children both of whom predeceased him. He devised the farm to his widow in fee, and after his death testator's administrator d. b. n. c. t. a. brought an action of ejectment therefor. *Held*, (1) the first taker took only a life estate, and (2) the gift over to the grandchildren was good, and a verdict was properly directed for the plaintiff.

3. In such case there was no merit in the contention that the first taker took an estate tail, enlarged by Act of April 27, 1855, P. L. 368, into a fee simple.

Argued May 15, 1917. Appeal, No. 45, Jan. T., 1917, by Ada McClintic, defendant, from judgment of C. P. Mifflin Co., August T., 1916, No. 61, on directed verdict for plaintiff in case of Miles R. McClintic, Administrator de bonis non cum testamento annexo, of Felix McClintic, Deceased, v. Ada McClintic and Harry Wagner. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKEE and WALLING, JJ. Affirmed.

Ejectment for the recovery of land in Mifflin County. Before BAILEY, P. J.

The opinion of the Supreme Court states the case.

On the trial the court directed a verdict for the plaintiff. Defendant appealed.

Error assigned was in refusing defendant's motion for judgment n. o. v.

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L. J. Durbin, with him *A. Reed Hayes*, for appellant.
—The first taker took an estate tail, enlarged to a fee simple by the provisions of the Act of April 27, 1855, P. L. 368; *Eichelberger v. Barnitz*, 9 Watts 447; *Vaughn v. Dickes*, 20 Pa. 509; *Hill v. Hill*, 74 Pa. 173.

An indefinite failure of issue is to be presumed unless there is something in the will to indicate that the testator meant a definite failure: *Carroll v. Burns*, 108 Pa. 386; *Nes v. Ramsay*, 155 Pa. 628; *Lewis v. Link Belt Co.*, 222 Pa. 139; *Hackney v. Tracy*, 137 Pa. 53.

In case of a doubtful construction the law leans in favor of an absolute rather than a defeasible estate: *Smith's App.*, 23 Pa. 9; *Jackson's Est.*, 179 Pa. 77; *Carter's Est.*, 254 Pa. 539.

Rufus C. Elder, for appellee.—By “lawful heirs” testator meant issue: *Amelong v. Dorney*, 16 S. & R. 323; *Braden v. Cannon*, 24 Pa. 168; *Wall v. Maguire*, 24 Pa. 248; *Covert v. Robinson*, 46 Pa. 274; *Moody v. Snell*, 81 Pa. 359; *Cochran v. Cochran*, 127 Pa. 38; *Seybert v. Hibbert*, 5 Pa. Superior Ct. 537.

The estate devised to the first taker was not a fee tail, enlarged by the act of assembly to a fee: *Eichelberger v. Barnitz*, 9 Watts 447; *Jessup v. Smuch*, 16 Pa. 327; *Middleswarth's Administrator v. Blackmore et al.*, 74 Pa. 414.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

In this action of ejectment, the common source of title was Felix McClintic. He died on October 6, 1883, and in his last will provided as follows: “Seventh: I give my son, Andrew F., the farm on which I now live at eight thousand (\$8,000) dollars, and if he should not have any lawful heirs, then after his death, the farm to be sold and divided equally between my son William three oldest children and my son Hugh three oldest children, and if any one of them should die before the property is divided, the balance to have it and out of this

property, the wife of my son, Andrew F., shall have one hundred (\$100) dollars each year from the death of her husband, Andrew F. McClintic, provided she shall remain his widow."

Upon the death of his father, Andrew F. McClintic took possession of the farm, and occupied it in person or by tenants until his death on September 26, 1915. He had two sons, both of whom died in the lifetime of their father so that Andrew F. McClintic died without living issue. His wife, Ada F. McClintic, survived him, and under his will claims title to the farm.

Upon the trial, the court below directed a verdict for the plaintiff, holding that under the clause of the will in question Andrew F. McClintic took an estate in fee determinable at his death without issue surviving him.

Obviously the words "lawful heirs" as used by the testator could only mean issue, since the devise over was to persons who would be included in the general term heirs. We also agree that the conclusion that the mere birth of issue was sufficient to vest the estate absolutely in Andrew was properly rejected. As the trial judge well says, "If the testator had in mind nothing further than the birth of issue, considering the nature of the language as used throughout the will, he would have adopted language in substance as follows: if my son Andrew F. have lawful heirs then after the death of my said son the farm is to go to them. The thought would have been positive instead of negative as in *McCullough v. Johnetta Coal Co.*, 210 Pa. 222."

The condition attached to the devise is "if he should not have any lawful heirs then after his death the farm to be sold and divided equally between" six of the testator's grandchildren, who were then living. It is familiar law that a limitation over by will to persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue: *Bedford's App.*, 40 Pa. 23. In the present case we think it is clear that the

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testator intended a definite failure of issue at the time of the death of Andrew F. McClintic, and that the devise over to his grandchildren was good. Contemplating also that the wife of Andrew F. would outlive her husband, the testator provided that from the proceeds of the sale of the farm, the wife, Ada, should have one hundred dollars a year during her widowhood. The farm was not to be sold in any event until after the death of the first taker. The gift of an annuity to the wife of Andrew shows that the testator contemplated that the contingency of Andrew's death without lineal heirs would happen in her lifetime, as well as within the lifetime of his grandsons. We can see no sound basis for the contention that, under the clause in question, Andrew F. McClintic took an estate tail, enlarged by the act of assembly into a fee simple. He took nothing more than a life estate in the premises in question, and had no interest therein which could be devised to the defendant.

The judgment is affirmed.

May's Estate.

Wills—Construction—Life estates—Remainders—Revocation of bequest for life—Effect on interest in remainder.

Testatrix bequeathed her residuary estate in trust to pay the income equally to three legatees for life, and provided that upon their respective deaths the principal represented by their respective shares of income should be paid to the child or children of such deceased legatee. By codicil testatrix revoked the bequest to one of the three persons named. *Held*, such revocation did not affect the gift in remainder to the children of such legatee, but created an intestacy as to the income which such legatee would have received for life had the bequest not been revoked.

Submitted May 15, 1917. Appeal, No. 230, Jan. T., 1916, by Mary J. MacTague and Ella B. McManemy, from decree of O. C. Philadelphia Co., April T., 1915, No.

Statement of Facts—Opinion of the Court below. [250 Pa. 167, dismissing exceptions to adjudication of trustees' account in Estate of Margaret A. May, Deceased. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.]

Exceptions to adjudication.

The facts appear from the following from the opinion of LAMORELLE, J.:

The testatrix bequeathed her residuary personal estate in trust to pay the net income to three persons named, share and share alike, for the term of their respective lives, and upon the death of any of them she directed that the principal represented by the share of income which any person so dying had been receiving should be paid to her child or children, with remainder over in default. By her codicil the testatrix revoked the bequest mentioned in her will to Mary E. Mulliken, one of the three, and in all other respects confirmed her will. It is now argued, that as this codicil revoked Mrs. Mulliken's right to participate in the entire income of the whole estate the other two cestui que trust life tenants should receive the entire income, share and share alike. The obvious meaning of the testatrix was to give to each of the three beneficiaries one-third of the income of the estate. That is clear from her language, "share and share alike during the term of their respective lives." The gift to three persons by name "share and share alike" and the limitation of the gift to their "respective lives" indicate clearly a severance of their beneficial interests, and the gift in remainder to their children can only mean a gift of one-third of the principal. The codicil revoked the life estate given to Mrs. Mulliken as to one-third, but did not affect the gift in remainder to her children.

The court in banc dismissed the exceptions to the adjudication. Exceptants appealed.

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Error assigned was in dismissing the exceptions to the adjudication.

A. Howard Ritter and *William W. Porter* submitted paper book for appellants.

No paper book was submitted for appellee.

PER CURIAM, June 30, 1917:

The provision in the will of the testatrix for *Mary E. McManemy*, now *Mary E. Mulliken*, was for income only, and, with the codicil's revocation of that provision, there was, as the court below correctly held, an intestacy as to such income, without affecting the testamentary disposition of the corpus or principal from which it accrued: *Reichard's App.*, 116 Pa. 232.

Appeal dismissed at appellants' costs.

Baur et al. v. Wilkes-Barre Light Co. et al. (Moore and Hourigan's Appeal).

Equity practice—Bill in equity—Injunction—Bond—Affidavit—Receivers—Protection of property—Act of May 6, 1844, P. L. 564, Section 1—Acts of March 21, 1806, S. M. L. 326, and June 16, 1836, P. L. 784—Equity Rules 81 and 82—Jurisdiction of court.

1. A court of equity is without jurisdiction to award an injunction where no bond has been filed as required by the Act of May 6, 1844, P. L. 564, Section 1, and made mandatory by the Act of March 21, 1806, S. M. L. 326.

2. Equity rules, promulgated by the Supreme Court in pursuance of the Act of June 16, 1836, P. L. 784, have the force of statutory enactments and must be strictly complied with.

3. The Act of 1844 and Equity Rules 81 and 82 requiring a bond and injunction affidavits apply where a receiver invokes the aid of equity to protect property in his possession from interference or invasion. The act is mandatory and applies to all cases.

4. A light company was declared insolvent and a receiver appointed by the Court of Common Pleas. Thereafter creditors filed a petition in bankruptcy, receivers in bankruptcy were ap-

pointed and the property turned over to them. Subsequently the petition in bankruptcy was dismissed and the receivers in bankruptcy filed their account, but were not discharged. The receiver previously appointed by the Common Pleas Court took possession of the property and filed a bill in equity for an injunction to restrain the receivers in bankruptcy from interfering with his management of the property; but failed to file a bond or injunction affidavits. The lower court granted a preliminary injunction which it subsequently refused to dissolve. *Held*, that the court was without jurisdiction to enter such decree and the injunction was dissolved.

Argued May 21, 1917. Appeal, No. 157, Jan. T., 1917, by Guy A. Moore and John A. Hourigan, from decree of C. P. Luzerne Co., in equity, Feb. T., 1912, No. 14, awarding a preliminary injunction in equity case of R. Baur & Son et al. v. The Wilkes-Barre Light Co., on petition of Martin J. Mulhall, Receiver of the Wilkes-Barre Light Co., v. Guy L. Moore and John A. Hourigan, Receivers of the Wilkes-Barre Light Co., appointed by United States District Court. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Reversed.

Bill in equity for an injunction. Before GARMAN, J.

The facts appear by the opinion of the Supreme Court.

The lower court granted a preliminary injunction which it subsequently refused to dissolve. Guy A. Moore and John A. Hourigan appealed.

Error assigned, among others, was the decree of the court.

Rush Trescott, with him *Edmund G. Butler* and *Andrew Hourigan*, for appellants.—The court is without jurisdiction to award an injunction where no injunction bond and affidavits have been filed: *Commonwealth v. Franklin Canal Co.*, 21 Pa. 117; *Erie & North-East R. Co. v. Casey*, 26 Pa. 287; *Makof v. Sherman*, 36 Pa.

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Superior Ct. 624; Equity Rules 81 and 82; Act of May 6, 1844, P. L. 564, Section 1.

W. I. Hibbs, with him *M. J. Mulhall*, for appellee.

OPINION BY MR. JUSTICE MESTREZAT, June 30, 1917:

This is an appeal by Moore and Hourigan, receivers in bankruptcy of the Wilkes-Barre Light Company, from a decree of the Court of Common Pleas of Luzerne County granting an injunction restraining them from proceeding in equity in the District Court of the United States for the Middle District of Pennsylvania.

In January, 1912, R. Baur & Son filed a bill in equity in the Common Pleas of Luzerne County against the Wilkes-Barre Light Company, alleging its insolvency and praying the appointment of a receiver. The company was adjudged insolvent, and Martin J. Mulhall, the appellee, was appointed receiver and qualified. Subsequently the creditors of the light company filed a petition in bankruptcy in the United States District Court and Thomas D. Shea was appointed receiver by that court. The Court of Common Pleas made an order directing Mulhall to turn over to Shea the books, papers and other property of the company and to render an accounting and statement of his receivership. The light company demurred to the petition in bankruptcy, Shea resigned, and Moore, Kirkendall and Hourigan were appointed receivers in bankruptcy in his stead. The receivers in bankruptcy managed the affairs of the company for over three years, during which time they issued certificates to the amount of upwards of \$10,000 to enable them to carry on the business of the company. These certificates remain unpaid and are outstanding.

In June, 1915, the District Court dismissed the petition in bankruptcy, its receivers filed their account, and on the audit thereof the court awarded commissions and counsel fees. The receivers have not been discharged, nor has the district court authorized or directed them to

turn over the assets of the company to Mulhall, the receiver appointed by the Court of Common Pleas. After the audit, Mulhall, assuming that the jurisdiction of the district court had ended, took possession of the property and as receiver has since been operating it. Moore and Hourigan filed a bill in the United States District Court to restrain Mulhall from interfering with their receivership. On April 5, 1917, Mulhall filed his petition in the Court of Common Pleas praying for an injunction to restrain the receivers in bankruptcy from proceeding further with the bill in equity in the District Court and from interfering in any way by legal process or otherwise with his management of the light company and the control of its assets. On the same day the court directed an injunction to issue as prayed for, and fixed a date to hear a motion to dissolve. Moore and Hourigan moved to dissolve the injunction assigning as reasons that it was issued without a bond and without affidavits; that the bill was not printed and did not contain a certificate that there was not time to print; that the bill prayed a permanent injunction and the court without qualification granted the prayer of the bill; that instead of complying with the proper practice of granting a preliminary injunction with a motion to continue the same, an injunction permanent in form was granted in the first instance, with leave to move to dissolve, thus improperly placing the burden on the defendants; that the injunction was granted ex parte without previous notice to defendants, without any averment of irreparable injury; and that the court was without jurisdiction, the District Court having exclusive jurisdiction.

On the hearing to dissolve the injunction the court, against the objection of the appellants, heard testimony as if on a motion to continue the injunction, and subsequently the motion to dissolve was denied. Moore and Hourigan, the receivers in bankruptcy, have appealed and assigned numerous errors, among which are the granting of the injunction without security and affi-

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davits, and denying the motion to dissolve. The appellants also aver, as a reason for reversing the decree, that the District Court of the United States had exclusive jurisdiction of the subject-matter of the complaint, and that the Court of Common Pleas was without jurisdiction and, therefore, had no right or power to grant the injunction.

We think the learned court below committed manifest error in granting the injunction. No bond or injunction affidavits were filed, and, hence, the court was without jurisdiction to award the writ. Such action by the court was in direct violation of the Act of May 6, 1844, P. L. 564, Section 1 of which provides: "No injunctions shall be issued by any court or judge, until the party applying for the same shall have given bond with sufficient sureties, to be approved by said court or judge, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction." In no case, therefore, can an injunction issue without security being given, as the Act of March 21, 1806, Sec. 13, 4 Sm. L. 326, provides that, "in all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued." The order awarding the injunction was also violative of equity Rule 82 which provides: "Cautionary orders in injunction bills shall not be made, nor shall any injunction be allowed except security be given according to law"; and of Rule 81 providing that preliminary injunctions may be granted, in accordance with the present practice, on bill and injunction affidavits. As we have frequently held, the equity rules, promulgated by this court in pursuance of the Act of June 16, 1836, P. L. 784, have the force of statutory enactments and must be strictly complied with. It, therefore, needs no argument to show that the court below was without authority to issue the injunction under the circumstances, and that the decree awarding the writ is a nullity. The de-

cisions of this court conclusively settle the question: *Erie & North-East R. R. Co. v. Casey*, 26 Pa. 287; *Kincaid's App.*, 66 Pa. 411; *Gilroy's App.*, 100 Pa. 5; *Juniata Water & Water Power Co. v. Wilson Electric Co.*, 226 Pa. 407.

The appellee contends that the act of assembly and the equity rules requiring a bond and injunction affidavits do not apply where a receiver invokes the aid of equity to protect the property in his possession from interference or invasion, but we regard this contention as having no merit. The Act of 1844 is mandatory and declares that no injunction shall be issued by any court or judge without sufficient security. This language is sufficiently comprehensive to include the present case. As said in *Commonwealth v. Franklin Canal Co.*, 21 Pa. 117, 130: "The words are broad and general, they apply to all cases." The equity rules are equally imperative in requiring injunction affidavits, and we can see no reason why the appellee should be relieved from a strict compliance with them. Both the law and the rules of court were adopted after mature consideration and from an experience which determined their necessity, for the protection of those against whom injunctions might be issued. It is true that a receiver is an officer of the court and acts for the court in the administration of the property in his charge, but the present case is not an attachment issued to punish a contempt of the court by interfering with its officer in the management of the property in his possession. It is simply the ordinary case of an injunction issued upon a bill or petition to restrain an alleged illegal act threatened by the defendant.

We are compelled to sustain the first, fourth, fifth and sixth assignments of error and reverse the court below for the reasons stated. The other questions raised by the several assignments become immaterial and need not be considered.

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The decree is reversed, and the injunction is dissolved at the costs of the appellee.

Yeager v. Anthracite Brewing Company, Appellant.

Negligence—Master and servant—Brewing company—Moving machinery—Change in operation—Increased danger—Failure to notify employee—Contributory negligence—Instructions to jury—Failure to request—Earning power—Charge of court—Pleading—Variance.

1. If the operation of a machine prior to changes is not attended with danger and changes, involving danger, are made without notice to or knowledge of an employee and in the exercise of ordinary prudence he would not observe such changes, it is the duty of the employer to notify him thereof, and failure to do so is negligence.

2. In an action by an employee against a brewing company to recover damages for personal injuries resulting from his arm being caught in the revolving cogs of a machine, the questions of defendant's negligence and the contributory negligence of the plaintiff were for the jury and a verdict and judgment for the plaintiff will be sustained where it appeared that it was the duty of the plaintiff, who was on night turn, to remove from time to time the malt which accumulated in the gear boxes of the malt dryer, a cylindrical drum revolving by means of cogwheels connected with the driving shaft; that in the performance of such services plaintiff was required to go to the rear of a chute which fed the dryer and to stand within a narrow space between the chute and reach over the gear, which had for many years been revolving outward and was therefore not dangerous; that nine days prior to the accident defendant changed the operation of the cogwheels so that they revolved inward instead of outward; that defendant did not notify plaintiff of such change and plaintiff was not aware thereof and could not observe same on account of the darkness of the place and the rapidity with which the cogs revolved; and while in the act of removing the malt his arm was caught in the cogs and he sustained the injuries complained of.

3. In such case the plaintiff was justified in assuming that the wheels were still revolving outward.

4. Where it appeared that the weekly wage of the plaintiff was the same after as before the accident, the court did not err, after referring to such fact, in charging that "it is for loss of earning.

power in the future that you are to compensate him, if anything. In other words, what would he continue to earn in the future had this accident not have happened, and that for a period of the balance of his life?" The test is whether the power or capacity to earn has been diminished as a result of the injury, and the earnings of the plaintiff subsequent to the injury, as compared with his earnings prior to the injury, are evidence, but not conclusive, as to whether his earning power has been diminished by reason of the injury.

Argued May 21, 1917. Appeal, No. 194, Jan. T., 1916, by defendant, from judgment of C. P. Northumberland Co., Feb. T., 1915, No. 193, on verdict for plaintiff in case of Charles Yeager v. Anthracite Brewing Company. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHISKER, FRAZER and WALLING, JJ. Affirmed.

Trespass for personal injuries. Before CUMMINGS, P. J.

The facts appear by the opinion of the Supreme Court.

Verdict for plaintiff for \$1,750 and judgment thereon. Defendant appealed.

Errors assigned were the charge of the court and in refusing to direct a verdict for the defendant.

Voris Auten, with him *Bastress & Tier* and *C. M. Clement*, for appellant.—Plaintiff voluntarily and unnecessarily placed himself in a position of danger and was guilty of contributory negligence: *Solt v. Williamsport Radiator Co.*, 231 Pa. 585; *Lowry v. Baldwin Locomotive Works*, 253 Pa. 87.

L. S. Walter, with him *J. Grant Kehler*, for appellee.—Plaintiff was justified in resting on the assumption that the gears of the machine were running outward as they had been for three years, in the absence of his ability to see the condition and in the absence of actual knowledge or notice of the change: *Fern v. Penna. R. R. Co.*, 250 Pa. 487.

OPINION BY MR. JUSTICE MESTREZAT, June 30, 1917:

This is an action of trespass to recover damages for injuries sustained by the plaintiff while he was in the service of the defendant company. The plaintiff had been employed as night engineer in the defendant's brewery for nine years prior to the accident which resulted in his injuries. It appears from the evidence, and is substantially stated by the learned court below in its opinion refusing a new trial, that, in addition to his duties as engineer, the plaintiff was required to remove, at stipulated periods, the malt which had accumulated in the gear boxes of the drying drum, or malt drier, which is a cylindrical drum some thirty feet in length and about thirty inches in diameter, and revolves by means of cogwheels or cog gearing connected with a driving shaft. The drum contains steam flues and is used for the drying of malt to be sold for feed. For the purpose of performing this service, the plaintiff was required to go to the rear of a hopper or chute which fed the drier and extended from the ceiling to within three feet of the floor and within two and one-half feet of the cogwheels or gearing which ran the drier. In removing the malt from the boxes, he was required to stand within the narrow space between the hopper and the drier, and to reach over the gearing which had, for many years, been running or revolving outward and, for that reason, did not endanger the person performing the service. About nine days prior to the accident, the defendant changed the operation of the cogwheels so that they revolved inward instead of outward. The plaintiff did not know of the change and did not discover it while attending to his duties because the place was dark, and his body shaded the dim light which hung above and back of him. On the night of the accident, he reached over the cogwheels or gearing, while in motion, to remove the malt from the gear boxes the same as he had done in the past, having been instructed by his employer to do the work while the machinery was in motion. In some manner his arm

was caught in the cogs between the elbow and shoulder. The muscles were torn and part of the muscle fibre and tissue was ground up in the cogs. His injuries are severe and permanent. The plaintiff did not know of the change in the motion of the cogs until after the accident had occurred.

In the statement of the cause of action, it is averred that the defendant failed to furnish plaintiff a safe place to work; failed to furnish him safe instruments with which to work; failed to properly guard, protect or cover the gears; and failed to properly instruct the plaintiff how to remove the malt from the gear boxes, and to warn him of the danger of coming in contact with the gearing. The defendant pleaded the general issue. The court submitted the case in a clear and adequate charge, and the jury found for the plaintiff. Judgment having been entered on the verdict, the defendant has taken this appeal.

The questions involved, as stated by the appellant, are: (a) Was the plaintiff entitled to cautionary instructions as to the changes made in the operation of the machinery; (b) was the plaintiff guilty of contributory negligence; and (c) was the charge of the court an adequate and proper presentation of the case to the jury?

We have stated the facts which the jury was warranted in finding from the evidence produced on the trial of the cause. We think the testimony was ample to submit to the jury on the question of the defendant's negligence, and that the court would not have been justified in declaring the plaintiff negligent as a matter of law. It is claimed that, as the wheels were revolving inward, the plaintiff was guilty of negligence in attempting to remove the malt from the gear boxes while the machinery was in motion. It is urged that the change made in the revolution of the cogwheels could be plainly seen by the plaintiff, and that he was and had been for a long time familiar with the operation of the machinery, and, therefore, knew of the change which the company

had made, or should have known it if he had exercised proper care in the performance of his duties. This contention is met by the testimony introduced by the plaintiff, which manifestly was for the consideration of the jury, that for some years prior to the accident he had performed this work while the wheels revolved outwardly and it was not attended with any danger; that, in removing the malt from the gear boxes, he was required to stand in the narrow space between the hopper and the drier, which was badly lighted, and that the cogwheels revolved so rapidly that it was difficult to determine the direction of the revolution of the wheels. The plaintiff had been instructed by the defendant prior to the change to perform the work while the machinery was in motion, which was attended with no danger so long as the cogwheels revolved outwardly. No covering or artificial guard over the machinery was necessary under those conditions. The plaintiff testified that he could not see the change in the revolution of the wheels because the light was dim and his body cast a shadow over the wheels, and that from his previous experience in performing the work he assumed on this occasion that the wheels were still revolving outwardly. He was justified in this assumption: *Fern v. Penna. R. R. Co.*, 250 Pa. 487. The change from the outward to the inward revolution of the wheels was made, as the jury found, without notice to, or the knowledge of, the plaintiff, and, therefore, whether or not, under the circumstances disclosed by the evidence, cautionary instructions as to the change made in the operation of the machinery should have been given him was a question for the jury. If the operation of the machine prior to the changes was not attended with danger and they were made without notice to, or knowledge of, the plaintiff and in the exercise of ordinary prudence he would not observe them, it was the duty of the defendant company to notify him of such changes if they involved danger, and the failure to do so was negligence for which the company was liable: Mc-

Keever v. Westinghouse Elect. & Mfg. Co., 194 Pa. 149; Coll v. Westinghouse Elect. & Mfg. Co., 230 Pa. 86; Jones v. American Can Co., 242 Pa. 611; Swauger v. Peoples Natural Gas Co., 251 Pa. 287; 3 Labatt, Master & Servant (2d Ed.), Sec. 923, page 2465.

The eighth assignment, alleging error in the general charge on the question of damages, is the only assignment that challenges the adequacy of the charge to the jury. The learned trial judge, after referring to the fact that the plaintiff received the same wage per week for his services after the accident as before, and for that reason it was claimed there would be no loss of earning power or capacity, said: "That might be true in one respect but it is your duty to take his earning capacity before and his earning capacity after into consideration in trying to determine what his earning capacity would be in the future. It is for loss of earning power in the future that you are to compensate him, if anything. In other words, what would he continue to earn in the future had this accident not have happened, and that for a period of the balance of his life." The learned counsel for the appellant seem to think, in view of the fact that the plaintiff's weekly wage was the same after as before the accident, the earning capacity of the plaintiff had not been diminished by reason of the injury, and, hence, he was not entitled to recover damages in this case. That is not the standard by which the plaintiff's future earning capacity should be tested; it is whether the power or capacity to earn has been diminished as a result of the injury: Leonhardt v. Green, 251 Pa. 579. The earnings of the plaintiff, subsequent to the injury, are, as compared with his earnings prior to the injury, evidence, but not conclusive, as to whether his earning power has been diminished by reason of the injury resulting from the accident: McLaughlin v. Corry, 77 Pa. 109. There was evidence in the case that the plaintiff's strength was much impaired, and that he was permanently unable to do as much or as heavy work as before the accident. He

may, therefore, as could have been found by the jury from this evidence, be compelled in the future to accept less remunerative employment than if he had not been injured. The fact that he was receiving at the time of the trial the same wage he had received previous to his injury was no assurance that in the future he would receive the same wage for similar employment, or that his injured condition would not compel him to accept a much smaller remuneration for labor which he could perform.

It is further claimed in this connection that the court should have told the jury that the earning capacity of the plaintiff would naturally and unavoidably decrease with advancing years, and that if he lived beyond a certain period his earning capacity, even though no accident had occurred, would probably cease entirely. This criticism is directed against the last sentence of that part of the general charge quoted above in which the court told the jury they should determine what the plaintiff would continue to earn in the future had the accident not happened, and for the period of the balance of his life. This instruction, taken in connection with what the court had already said on the question of damages, was correct: *Scott Township v. Montgomery*, 95 Pa. 444. It would hardly be necessary for the court to tell an intelligent jury, what every jurymen would otherwise know, that a man's earning power would decrease as the years went on, and that finally total incapacity to work would follow. The instructions of the court below, which have been approved by this court, did not warrant the jury in finding that the plaintiff's earning capacity would not change with the years, and would be the same at the end of a long life as it was immediately after he was injured. If the appellant company desired other or more explicit instructions on this branch of the case, they should have been requested by a point or points properly framed and presented to the court.

There was no variance between the averments of the statement and the proof on the trial of the cause. If the

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amendment of the statement was necessary, it did not change the cause of action, and was properly allowed by the court. We do not see, however, that the proof adduced on the trial was not fully covered by the allegations of the original statement.

The question raised by the seventh assignment of error is not covered by the statement of the questions involved, and, hence, as we have repeatedly held, will not be considered.

The judgment is affirmed.

Commonwealth v. Schwarzschild, Appellant.

Taxation—Foreign corporations—Capital—Bonus—Act of May 8, 1901, P. L. 150.

The bonus imposed on the capital of a foreign corporation by the Act of May 8, 1901, P. L. 150, is upon its capital or property actually employed within this State and not upon the proportionate value of the company's stock here employed.

Argued May 21, 1917. Appeal, No. 11, May Term, 1917, by defendant, from judgment of C. P. Dauphin County, Commonwealth Docket, No. 387, 1911, on case submitted without jury in case of Commonwealth of Pennsylvania v. Schwarzschild & Sulzberger Company of America. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Appeal by foreign corporation from settlement of account by auditor general and State treasurer.

The facts appear by the following opinion by McCARRELL, J.:

Trial by jury has been duly waived in this case. From the testimony submitted we find the following

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STATEMENT OF FACTS:

The defendant was incorporated February 10, 1904, under the laws of the State of New Jersey. It began business in Pennsylvania October 26, 1909, and filed a report May 11, 1911, for the purpose of having settled the amount of bonus it was required to pay. This report showed that its capital stock was \$250,000, \$100,000 of which was issued as preferred stock. The report further claimed that the amount of capital stock wholly employed in Pennsylvania was \$53,275, and that during the year ending November 30, 1910, the average amount of stock in trade carried in Pennsylvania was \$245,000. The accounting officers contending that the bonus was to be computed on the amount of capital employed in Pennsylvania fixed this amount, based upon statements contained in the company's report as to the value of its capital stock for the same year at \$685,706, and charged the company with a bonus of one-third of one per cent. thereon, amounting to \$2,285.69. This settlement was made September 25, 1911, and the defendant duly appealed therefrom.

The defendant company contends that the bonus is based upon the proportionate amount of the value of the company's capital stock employed in Pennsylvania, and claims that this proportion is \$53,275. The defendant has paid a bonus of \$177.58, based upon this contention. The question now to be determined is whether the bonus is to be computed upon the proportionate value of the capital stock of the defendant company employed in Pennsylvania, or upon the amount or value of capital employed wholly within the State.

DISCUSSION.

The Act of May 8, 1901, P. L. 150, under which the settlement in this case was made provides that foreign corporations "shall pay to the State treasurer for the

use of the Commonwealth a bonus of one-third of one per cent. upon the amount of their capital actually employed or to be employed within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed." The bonus is upon the amount of capital actually employed or to be employed. The act makes no mention of capital stock except to inquire the amount of the authorized capital stock of the company. The language of this statute differs from the statutes relating to bonus on domestic corporations.

The Act of May 1, 1868, P. L. 108, 113, Sec. 15, relating to domestic companies, directs the payment of "a bonus of one-quarter of one per cent. upon the amount of capital stock which said company is authorized to have." All our subsequent statutes relative to bonus payable by domestic corporations (to wit: April 18, 1874, P. L. 61; April 29, 1874, P. L. 73; May 7, 1889, P. L. 115; June 15, 1897, P. L. 155; May 3, 1899, P. L. 189) impose it upon the capital stock, and the Acts of June 15, 1897, P. L. 155, and May 3, 1899, P. L. 189, require payment of a bonus of one-third of one per cent. upon the amount of capital stock which the company is authorized to have and a like bonus upon any subsequent increase thereof.

The Act of May 8, 1901, P. L. 150, already referred to is the original act requiring the payment of bonus by foreign corporations doing business in this State. The act does not require any investigation as to the value of the capital stock and it does not ask for information necessary to enable the value of its capital stock to be accurately ascertained. The application or report requires only a statement, as follows:

1. The state or country in which incorporated or created.
2. The date of incorporation or organization.
3. The location of its chief office in this State.
4. The name and address of its president and treasurer.
5. The amount of its bonded indebtedness.

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6. The amount of its authorized capital stock.
7. The amount of capital paid in.
8. The amount of capital employed wholly in the State of Pennsylvania.

These matters are very different from what is required from corporations making reports for the purpose of having the actual value of capital stock ascertained for the purpose of taxation. Here there is no inquiry as to the gross earnings of the corporations, its net earnings, total amount of its business or property, the dividends paid, or the prices at which sales of stock have been effected. The acts already referred to with respect to domestic corporations require the payment of bonus not upon capital employed, but upon the authorized capital stock of the corporation. The act we are here considering imposes the bonus not upon capital stock but upon capital actually employed within the State. If the legislature intended that the bonus was to be paid on the value of the capital stock it is strange that the language of the acts imposing bonus upon domestic corporations was not followed. Bonus is payable only once, unless there be an increase of capital stock or capital employed. Domestic corporations naturally pay the bonus upon the authorized capital, and this is payable at the creation of the corporation and before the investment of capital has resulted in profitable management and an increase in the actual value of the shares of capital stock. According to the report of the defendant company, which was offered in evidence here with respect to the value of its capital stock for the year 1910, it appears that the value of the proportion of its capital stock employed in Pennsylvania was \$53,275. The value of real property employed in Pennsylvania was \$180,951.60. Its cash and current assets were \$340,688.18. Its merchandise was \$163,066.69. Its liabilities in Pennsylvania were \$632,431.47. Capital may be either cash or property, real or personal, and from this report the company apparently had employed in Pennsylvania

property and merchandise amounting to \$344,018. The cash and current assets mentioned in this report are uncertain in their character and no testimony was offered by the Commonwealth to indicate particularly what amount of cash was in Pennsylvania, in what way it was used, or of what the current assets consisted. Under this may have been included bills receivable and current accounts. If so, according to the decision in the case of Commonwealth v. G. W. Ellis Co., 237 Pa. 328, this item cannot be considered as any part of the basis for bonus settlement. In this case it is said, page 330:

"The bills and accounts receivable certainly do not represent capital actually employed wholly within the State of Pennsylvania. This may indicate to some extent the volume of business done by the corporation in the State, but the bonus is not payable upon the volume of business from year to year, but upon capital actually employed within the State."

From the capital stock report for the year 1910, it appears that the total value of all the assets of the company was \$3,217,737, and the value of all the assets in Pennsylvania was \$685,706. From these figures it appears that $685,706/3,217,737$ of \$250,000, being the whole capital, amounts to \$53,275, upon which sum alone the defendant contends it is liable for bonus. If the bonus can properly be based upon this proportionate value of the capital stock employed, the company would be permitted apparently to have and actually employ in Pennsylvania capital of a very much larger amount without payment of any bonus. There can be no doubt that the company had in Pennsylvania and was actually employing or using property of the value of \$344,018. The Act of 1901, by its terms seems to require that the bonus shall be paid upon this amount. It is true that the terms "capital" and "capital stock" are sometimes properly regarded as synonymous terms. Capital is the money contributed for corporate purposes and may be expended for any proper corporate use. When invested

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in property it becomes capital stock, which is issued in shares to the stockholders in proportion to their respective contributions of capital. The value of capital stock is therefore primarily the value of the corporate property. Successful corporate activity naturally will increase the market value of the shares and cause them to sell in the market for more than par. Unsuccessful operation will naturally lower the market value. The value of the capital stock is presumably the value of all the property owned by the corporation, unless there be indebtedness, and indebtedness must necessarily be considered in estimating the market value. Whether or not the total indebtedness should be deducted from the market value or par value of the stock requires careful consideration in each case. The practice has been not to deduct it absolutely, but to give it such consideration as in the judgment of the court it deserves to have in fixing the market value of the stock. The five mill tax on the value of capital stock is always ascertained and adjusted in this way, because the tax is by the terms of the taxing statute imposed upon the market value of the stock as ascertained by sales made between certain limited periods and from the consideration of all relevant facts bearing upon the question of value. The bonus, however, according to the terms of the Act of May 8, 1901, is payable not on the value of capital stock, but upon the amount of capital actually employed in Pennsylvania, and the inquiry in every case of that kind is simply as to the amount of capital employed in the State, which, as a general rule will be found to be the actual cost or value of the property within the limits of the State. There is no question as to the value of the corporate franchise of a foreign corporation in ascertaining the basis for the bonus to be paid in Pennsylvania. The franchise of the corporation has been granted by the State which created it, and we cannot tax the value of a franchise or consider it in adjusting the bonus paid for the privilege of doing business in Pennsylvania.

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The bonus upon our domestic corporations, while nominally ascertained by the amount of capital stock, does not provide for any inquiry as to the value of the capital stock. It is fixed by the amount of authorized capital and is payable on the amount originally authorized and upon any subsequent increase of the amount. This of course, makes the nominal value of capital stock the basis for the bonus. At the beginning of corporate existence the amount of capital, whether contributed in cash or in property is the amount upon which the bonus is computed. To permit fixing the value of capital stock as a basis for the bonus to be paid by domestic corporations and the value or amount of capital employed in the State to be made the basis for the bonus of a foreign corporation would apparently lead in some cases to discriminations, which we cannot presume were intended to be made by the legislature. The language of the Act of 1901 imposes the bonus upon the amount of capital actually employed and the failure to provide in the statute any inquiry as to facts from which the value of capital stock could be accurately ascertained, as also the other matters herein referred to, lead us to adopt that construction of the act which makes the basis for the bonus the amount of property employed in the State. This means the value of the property and not the value of stock aided by franchises and other matters affecting value. In the present case we therefore have reached the following

CONCLUSION :

The amount of capital employed wholly within the State by the defendant company was :

Real property, ...	\$180,951.60	
Merchandise, ...	163,066.69	
		\$344,018.29

The bonus of one-third of one
per cent. upon this amount

is\$ 1,146.72

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The defendant company has	
paid on account of bonus.....	177.58
Balance of bonus,.....\$	969.14
Interest Nov. 25, 1911, to Nov.	
17, 1916, ...	288.86
	\$ 1,258.00
Attorney General's commis-	
sion, 5 per cent., ...	62.90
Amount now due Common-	
wealth, ...	\$ 1,320.90

We, therefore, direct that judgment be entered in favor of the Commonwealth and against the defendant for the sum of \$1,320.90, unless exceptions be filed within the time limited by law.

Exceptions to the findings were dismissed and judgment was entered for plaintiff. Defendant appealed.

Error assigned was in dismissing exceptions to various findings of the trial judge.

Paul G. Smith, of *Snodgrass & Smith*, with him *John W. Jacobs*, for appellant.

William M. Hargest, Deputy Attorney General, with him *Francis Shunk Brown*, Attorney General, for the Commonwealth.

PER CURIAM, June 30, 1917:

The correct conclusion of the learned court below was that the bonus imposed by the Act of May 8, 1901, P. L. 150, is upon the capital or property of a foreign corporation actually employed within this State, and the judgment is affirmed, on the opinion directing it to be entered.

**Commonwealth v. Dollar Savings Bank, Appel-
lant.**

Constitutional law—Constitution of United States, Fourteenth Amendment—Constitution of Pennsylvania, Article I, Section 10; Article III, Sections 16 and 21—Property rights—Payment of money by State without appropriation—Limitation of action against corporation—Banks and banking—Deposits—Failure to demand money within thirty years—Payment to State—Depositor's right against State—Contract subject to statute—Act of April 17, 1872, P. L. 62—Validity—Act of May 11, 1909, P. L. 519—Affidavits of defense—Insufficient averments.

1. Every sovereign state has jurisdiction to take charge of apparently abandoned or unclaimed property.

2. The Act of April 17, 1872, P. L. 62, providing that "where any depositor with any savings fund, savings institution or savings bank whatsoever, or his legal representatives, shall omit to make any demand for the amount deposited by him, or for any part thereof, for the space of thirty years after the last deposit or payment was made by or to him". . . . such funds shall be paid by the bank to the State and thereafter the depositor may recover same from the State, does not violate the Fourteenth Amendment of the Constitution of the United States, or the 10th Section of Article I of the Constitution of Pennsylvania in that it deprives a person of property without due process of law, the rights of the depositor being amply protected by giving him a cause of action against the Commonwealth, which, because of its power of taxation, is always solvent and the best of security.

3. A court will never heed objections to the constitutionality of an act of assembly unless the complainants are affected by the particular feature alleged to be in conflict with the Constitution.

4. In an action by the Commonwealth against a banking institution to recover deposits in its hands after thirty years have elapsed from the last addition to or payment therefrom it will be presumed, in the absence of an averment to the contrary in the affidavits of defense, that all the deposits in controversy were made subsequent to the passage of the Act of 1872, and that the respective depositors acted with full knowledge of the provisions of said act, and in view of such presumption there is no merit in the contention that the act is defective in failing to provide, as in the case of an escheat, for notice by publication or otherwise to the owner.

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5. In such case the contract of a depositor must be treated as subject to the terms of the Act of 1872, and the proceeding is therefore not an impairment of the obligations of the contract.

6. The question whether the failure of the Act of 1872 to permit a depositor to claim interest from the State renders the act invalid, can be raised only by the depositor and not by the bank in an action against it by the Commonwealth.

7. The Act of 1872 is not contrary to Article III, Section 16 of the Constitution of Pennsylvania in that it attempts to authorize the payment of money by the State treasurer without special appropriation. Such provision of the Constitution simply means that the public funds are not to be expended in any way except as directed by the law-making power, and does not intend to prevent the legislature from providing a special fund to be paid out in a designated manner, or to prevent the law-making power from pledging unappropriated funds for the return of moneys taken into the custody of the State under such act, concerning which the Commonwealth asserts no right or title paramount to that of the original owner.

7. The Act of May 11, 1909, P. L. 519, does not impliedly repeal the provisions for repayment contained in the Act of 1872.

8. The Act of 1872 applies to all banking institutions, whether incorporated or otherwise, and is not a statute of limitations but rather an enactment for the protection of a savings bank against liability after it has paid over a deposit to the State treasurer, and such act is not therefore violative of Article III, Section 21 of the Constitution of Pennsylvania in that it prescribes a limitation of time within which an action may be brought against a corporation different from the general laws regulating actions against natural persons.

Argued May 21, 1917. Appeal, No. 3, May T., 1917, by defendant, from judgment of C. P. Dauphin Co., Sept. T., 1914, No. 296, for plaintiff for want of a sufficient affidavit of defense in case of Commonwealth of Pennsylvania v. The Dollar Savings Bank. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Assumpsit against savings bank to recover unclaimed deposits under Act of April 17, 1872, P. L. 62.

From the record it appeared that the Act of April 17, 1872, P. L. 62, construed in the following opinion of the

Supreme Court, is entitled, "An act, relating to unclaimed deposits in savings banks, and transfer of stock." Section 1 refers to management and is not material to this case. Section 2 reads as follows: "That where any depositor with any savings fund, savings institution or savings bank whatsoever, or his legal representatives, shall omit to make any demand for the amount deposited by him, or for any part thereof, for the space of thirty years after the last deposit or payment was made by or to him, or his said representatives, no action or suit shall thereafter be brought or maintained by him or them, for the amount of such deposit, against such corporation, but the same shall be paid over instead to the State treasurer for the use of the State: Provided, That no one now having any such right of action shall be so barred, until the expiration of one year from the passage of this act: And Provided, That it shall be lawful for such depositor or his legal representatives, at any time after the amount of his deposit shall have been paid over into the treasury of the Commonwealth as aforesaid, to institute and prosecute an action of debt therefor, against the State treasurer for the time being, in the Court of Common Pleas for Dauphin County; and on the recovery of judgment in such action, it shall be lawful for the court to issue thereon a writ, commanding such State treasurer, or his successor in office, to cause the amount thereof, with costs, but without interest, to be paid to the party entitled in the judgment, out of any unappropriated moneys in the hands of the State treasurer, or if there be no such moneys unappropriated, then out of the first moneys that shall be received by him, and to enforce obedience to such writ by attachment, as is provided by law, in respect to actions against counties and townships." Section 3: "It shall be the duty of the treasurer or cashier of every incorporated savings fund institution or bank in this Commonwealth, on or before the first day of November, in each year after the present, to make returns to the auditor general, of the

amount of all such unclaimed deposits as referred to in the previous section of this act, with the names and residences of the depositors, so far as known, and before the first day of January, then next ensuing, pay over the amounts so returned to the State treasurer, whose receipt therefor shall be a full and sufficient discharge to such saving fund institution or bank, from any further liability to any such depositor." Section 4 provides for the issuing of certificates of stock by savings banks having a capital stock, and is not material to this case.

The lower court entered judgment against the defendant for want of a sufficient affidavit of defense. Defendant appealed.

Error assigned was in entering judgment for plaintiff.

George C. Burgwin, of H. & G. C. Burgwin, with him James A. Stranahan, for appellant.—The Act of April 17, 1872, P. L. 62, violates Article III, Section 21 of the Constitution of Pennsylvania and is void: *Bank of U. S. v. Biddle & Andrews*, 2 Parsons Eq. Cases 31; *Second Nat. Bank of Titusville v. Thompson*, 44 Pa. Superior Ct. 200; *Girard Bank v. Bank of Penn Township*, 39 Pa. 92; *Baker et ux. v. Kelley*, 11 Minn. 480; *Keyser v. Lowell*, 117 Fed. Repr. 400; *Kulp v. Brant*, 162 Pa. 222; *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103; *In re Grape Street*, 103 Pa. 121; *Cole v. Economy Township*, 13 Pa. C. C. 549.

The Act of 1872 is violative of Article III, Section. 16 of the Constitution of Pennsylvania, in that it authorizes the payment of money out of the State treasury but makes no appropriation to meet such expenditure: *Commonwealth ex rel. Bell v. Powell*, 249 Pa. 144.

The Act of 1872 violates the Fourteenth Amendment of the Constitution of the United States and the 10th Section of Article I of the Constitution of Pennsylvania in that it deprives a person of property without due process of law: *Provident Institution for Savings in Town of*

Boston v. Malone, 221 U. S. 660; *City of Philadelphia v. Miller*, 49 Pa. 440; *Cunnius v. Reading School Dist.*, 198 U. S. 458.

Notice, actual or constructive, is the absolute essential in statutes of this character: *Craig v. Kline*, 15 Pa. 399; *Alton's Est.*, 220 Pa. 258.

The defendant bank has the right to raise the question of the constitutionality of the act: *Provident Institution for Savings in Town of Boston v. Malone*, 221 U. S. 660.

John R. Geyer, of Fox & Geyer, with him W. I. Swoope and J. B. Eichenauer, for appellee.—The Act of 1872 does not operate to deprive a person of property without due process of law or take private property for public use without compensation: *Provident Institution for Savings in Town of Boston v. Malone*, 221 U. S. 660; *Pittsburgh v. Scott*, 1 Pa. 309; *Delaware County's App.*, 119 Pa. 159; *Blackstone v. Miller*, 188 U. S. 189.

The State has jurisdiction to take charge of and care for abandoned or unclaimed property: *Cunnius v. Reading School District*, 198 U. S. 458.

The Act of 1872 is not a statute of limitations and applies to unincorporated banking institutions as well as those incorporated, and consequently does not violate the constitutional prohibition against prescribing a limitation of time for bringing actions against corporations different from the general laws regulating actions against natural persons: *Opinion of the Attorney General in Bull's Est.*, 11 Pa. C. C. 441; *In re Sixpenny Saving Society*, 28 Pa. C. C. 627.

The Act of 1872 does not violate the constitutional prohibition against payment by the State treasurer unless on specific appropriation, the Constitution merely meaning that public funds are not to be expended in any way except as directed by the law-making power: *Commonwealth ex rel. Bell v. Powell*, 249 Pa. 144; *Commonwealth ex rel. Atty. General v. Griest*, 196 Pa. 396.

Defendant bank has no standing to raise the question

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of the constitutionality of the Act of 1872, the depositors being the real parties in interest: *Plymouth Coal Co. v. Com. of Penna.*, 232 U. S. 531; *Reed v. Home Savings Bank*, 130 Mass. 443; *Essex Public Road Board v. Shinkle*, 140 U. S. 334; *Lampasas v. Bell*, 180 U. S. 276; *Bradley v. Richmond*, 227 U. S. 477.

OPINION BY MR. JUSTICE MOSCHZISKE, June 30, 1917:

The Commonwealth of Pennsylvania sued the Dollar Savings Bank, of Pittsburgh, to recover the sum of \$9,069.29, with interest from December 1, 1913, which it alleged was the aggregate of moneys placed in that institution by twenty-four depositors "who had omitted to make any demand for the amount deposited by them, or for any part thereof, for the space of thirty years after the last deposit was made." Plaintiff averred that, under the Act of April 17, 1872, P. L. 62, it was the duty of the defendant to pay these deposits to the treasurer of the Commonwealth. Judgment was entered for want of a sufficient affidavit of defense, and the savings bank appealed.

In addition to certain purely legal defenses, the affidavits of defense allege that twelve of the twenty-four depositors named in plaintiff's statement, subsequent to the expiration of the before-mentioned period of thirty years, had either added to, subtracted from, or withdrawn the entire amount of their respective accounts, totaling \$6,312.13. The Commonwealth filed an amended statement striking out all deposits as to which the bank had entered a defense on the merits, and reducing the amount claimed to \$2,757.16.

The legal defenses are as follows: (1) The Act of 1872, *supra*, relied upon by plaintiff, "violates the Fourteenth Amendment of the Constitution of the United States and the 10th Section of Article I of the Constitution of Pennsylvania, in that it deprives a person of property without due process of law"; (2) The act "is contrary to Article III, Section 16, of the Constitution

of Pennsylvania, in that it attempts to authorize the payment of money by the State treasurer without special appropriation"; (3) The act "violates Article III, Section 21, of the Constitution of Pennsylvania, in that it prescribes a limitation of time within which an action may be brought against a corporation different from the general laws regulating actions against natural persons."

In disposing of the first of the above propositions, we must keep in mind that the statute here in question is not an escheat act. In other words, it does not provide for seizing property presumed to be without an owner, but rather for the taking into possession by the sovereign Commonwealth, for the protection of both State and owner, of a certain class of property which is subject to escheat. The act requires that, in all cases where, for a period of thirty years, any person has failed to exercise rights of ownership over a savings fund deposit, the amount thereof shall be handed to the State treasurer, whose receipt it declares a sufficient protection to the prior custodian. The rights of the owner are amply protected by giving him a cause of action against the Commonwealth, with full provision for legal proceedings and final process, under which either he or his legal representatives may recover the amount of the deposit upon proof of identity. This is neither depriving the depositor of his property nor taking it for public use within the meaning of either the federal or state constitutions.

The portion of the Fourteenth Amendment to the Constitution of the United States depended upon by defendant is as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law"; and the relevant part of the Constitution of Pennsylvania reads thus: "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." While, by operation of the Act of 1872, *supra*, right of action against the depository is taken away, yet this is no substantial deprivation to the owner of the de-

posit, for instead of that right, as soon as his money is turned over to the State treasurer, he is afforded an action against the Commonwealth and provided with a court in which, without limitation of time, he may prove his claim. True, the act says that the deposit shall be paid "to the State treasurer for the use of the State," but it also specially provides that, when claimed by the depositor or his legal representatives, the amount proved shall be paid over to the party entitled thereto "out of any unappropriated moneys in the hands of the State treasurer, or if there be no such moneys unappropriated, then out of the first moneys that shall be received by him"; which, in effect, is a dedication, so far as may be necessary, of all unappropriated moneys in the State treasury to the purpose of satisfying duly proved claims under this act. Since the State, with its power of taxation, is always solvent, it would be impossible to give better security.

The act before us does not, in so many words, say that a savings fund deposit which for thirty years has been entirely neglected by its owner shall be presumed to have been abandoned, but it is plain that such is the theory upon which the legislation rests; and it is well established that every sovereign state has jurisdiction to take charge of apparently abandoned or unclaimed property: *Cunnius v. Reading School District*, 206 Pa. 469; s. c., 198 U. S. 458; *Attorney General v. Provident Institution for Savings in Town of Boston*, 201 Mass. 23; s. c., 221 U. S. 660. When, as here, such property is taken in charge by the State, and the owner or his legal representatives are given an unlimited right to reclaim, with a pledge of all unappropriated moneys in the public treasury, so far as may be necessary, to repay the amount thereof when duly proved, this is simply an exercise of authority over property actually within the jurisdiction of the State, and liable to escheat, for the due protection of all parties in interest, including the owner; and is in no sense a taking or seizing for public use within the

meaning of the constitutional provisions relied upon in this case.

Generally speaking, when property is taken under an out-and-out escheat act or when the State provides a method of transferring to others property of a citizen who has been unheard of for a given period of time, some form of notice to the owner, by publication or otherwise, is required to make the proceedings in question "due process of law"; defendant contends that this rule applies in the present instance, and, since the legislation under attack does not provide for any such notice to depositors affected through its operations, defendant insists that in this respect the Act of 1872, *supra*, is fatally defective. Conceding, for the sake of argument, defendant has a right to raise this constitutional point, yet, in so contending, it speaks only on behalf of the depositors whose money is being transferred to the State treasury, since the bank itself received due and formal notice of the present proceedings. When the case is viewed from the standpoint of these depositors, then the rule applies that "a court will never heed objections to the constitutionality of an act of assembly unless the complainants are affected by the particular feature alleged to be in conflict with the Constitution"; furthermore, it is always essential for a complainant to show that he occupies such a position: *Mesta Machine Co. v. Dunbar Furnace Co.*, 250 Pa. 472, 476. On the pleadings at bar, there being no averment to the contrary in the affidavits of defense, we must assume all the deposits in controversy to have been made subsequent to 1872; and, hence, that the respective depositors acted with full knowledge of the provisions of the statutes passed in that year. This being so, since the proceedings on the part of the State to obtain possession of these deposits were not instituted for the purpose of declaring an escheat or of passing the property in question over to another, in short, were not in antagonism to the owners, but for their benefit, there exists no absolute necessity for any form of notice to

such owners, as the latter are presumed to know that, after expiration of the thirty-year period, the Commonwealth, at any time, may take over the custody of their deposits in the manner provided by the act dealing with the subject in hand.

Before leaving this branch of the case, albeit defendant does not raise the point, it may be well to suggest that, since the deposits in controversy were all made subsequent to the Act of 1872, *supra*, in each instance the contract of the depositary must be treated as subject to the terms of the statute here in question; therefore, the present proceedings can in no sense be said to constitute an impairment of the obligation of these contracts. Finally, the fact that, under the Act of 1872, *supra*, a depositor may not claim interest from the State, does not present a subject which calls for consideration at this time; "this is a matter with which.....[the defendant].....is not concerned, and can arise only between the State and the claimant when he asserts [his] right [of].....property": *Provident Savings Institution's Case*, 221 U. S. 660, 665.

Defendant's second proposition rests upon the provision of the Constitution of Pennsylvania to the effect that "no money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." We recently had occasion to construe this section in *Comm. ex rel. Bell v. Powell*, 249 Pa. 144, 156, and there said, it "simply means that the public funds are not to be expended in any way except as directed by the law-making power." It was not the intention thereby to prevent the legislature from providing a special fund to be paid out in a designated manner, or to prevent the law-making power from pledging unappropriated funds for the return of moneys taken into the custody of the State under an act such as the one at bar, and concerning which money the State asserts no right or title paramount to that of the original owner. As to the Act of May 11,

1909, P. L. 519, it is sufficient to say, we are not convinced that it impliedly repeals the provisions for repayment contained in the Act of 1872, *supra*; the later act was not intended to apply to circumstances such as there covered by the earlier one.

The third proposition relied upon by the defendant involves a consideration of that portion of the Constitution of Pennsylvania which provides that "no act shall prescribe any limitations of time within which suits may be brought against corporations.....different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided." In entering upon this branch of the case, it may be well to notice that the title of the statute here before us gives no suggestion that the act is intended to apply solely to incorporated institutions; it is entitled, "An act, relating to unclaimed deposits in savings banks,," and, while other sections make reference to incorporated banks and savings funds, or "savings banks having a capital stock," yet Section 2, which controls the present case, is written in language broad enough to comprehend all such institutions, whether incorporated or otherwise. It reads as follows: "Where any depositor with any savings fund, savings institution or savings bank whatsoever.....shall omit to make any demand," etc. True, later on, this section contains the provision that, after thirty years, no suit may be instituted or maintained "for the amount of such deposit, against such corporation"; but it is argued by plaintiff that the word "corporation" is here used in "a generic sense.....to cover unincorporated as well as incorporated" savings institutions. It is not necessary to decide this point, however, for we are convinced the court below expressed a proper view of the matter in the following excerpt from its opinion: "We do not look upon this provision of the statute [Act of 1872, *supra*] as a statute of limitations strictly so called, such as was intended to be avoided by Section 21 of Article III of the

Constitution, but rather as an enactment for the protection of the savings banks against liability after it has paid over the deposit to the State treasurer. The statute takes away the remedy of the depositor against the bank, and substitutes for it the remedy against the State treasurer and the Commonwealth which has received the deposit. But, be that as it may, the other provision in the statute amply protects the savings bank. In the second section, it is provided that the State treasurer's receipt shall be a full and sufficient discharge of the savings bank from any further liability to the depositor. Both provisions.....were intended to protect the savings bank; so even if the first.....be avoided.....it still has full protection in the effect which the statute directs shall be given to the receipt of the State treasurer." In other words, even if it be conceded that, after the lapse of thirty years, the depositor or his legal representatives might still have a right to sue the bank, yet, since the State has full jurisdiction to take over the custody of apparently abandoned property, the receipt of its treasurer, when produced by the defendant bank, would be a sufficient answer to such an action; hence, the bank cannot be in any wise prejudiced by the alleged unconstitutionality of the limitation. Then again, it is to be noticed that, even after thirty years, the Act of 1872, *supra*, does not deprive a depositor of either his remedy or right of action, but simply transfers the liability to him from the original depository to the Commonwealth of Pennsylvania.

The assignments of error are overruled, and the judgment is affirmed.

Getkin, Appellant, v. Pennsylvania Railroad Company.

Railroads—Relief fund—Death benefits—Suit at law—Recovery—Satisfaction—Subsequent claim against relief fund—Affidavits of defense—Sufficiency—Act of Congress of April 22, 1908.

1. A regulation of a relief association of a railroad company providing that the recovery of a judgment in a suit for damages on account of injury or death of a member shall preclude any claim upon the relief fund for benefits on account of such injury or death, is valid; and where a widow has recovered a judgment against the railroad company for the death of her husband she cannot thereafter assert a claim against the railroad relief fund, and an affidavit of defense setting up such regulation as a bar to such action is sufficient.

2. In such case the Act of Congress of April 22, 1908, 35 Statutes-at-large 65, c. 149, No. 5, providing that any "contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void," is not applicable, such act not intending that there should be both a payment of benefits and a recovery of damages for the injury, at least in so far as payments for both are to be made by the same defendant.

3. In such case, had plaintiff received payment of the benefit certificate prior to bringing suit for damages, the stipulation in the contract of membership in the relief fund could not have been permitted to defeat the right to recover damages, but defendant would have been entitled to set off the sum it had so paid the plaintiff.

Argued May 21, 1917. Appeal, No. 2, May T., 1917, by plaintiff, from judgment of C. P. Dauphin Co., Jan. T., 1915, No. 631, refusing plaintiff's motion for judgment for want of a sufficient affidavit of defense in case of Ella Getkin v. Pennsylvania Railroad Company. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

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Assumpsit on a railroad relief association certificate to recover death benefits.

The facts appear by the opinion of the Supreme Court.

The lower court refused plaintiff's motion for judgment for want of a sufficient affidavit of defense. Plaintiff appealed.

Error assigned, among others, was in refusing plaintiff's motion for judgment for want of a sufficient affidavit of defense.

William M. Hain and William M. Hargest, for appellant.—Plaintiff was entitled to judgment for want of a sufficient affidavit of defense: Act of Congress of April 22, 1908, 35 Statute-at-large 65, c. 149, No. 5.

The regulations of the relief department of the defendant in denying liability upon benefit certificates where suits are brought are in violation of the Act of Congress of 1908: *Johnson v. Philadelphia & Reading R. R. Co.*, 163 Pa. 127; *Ringle v. Penna. R. R. Co.*, 164 Pa. 529; *Hartman v. Chicago, Burling. & Quincy R. R. Co.*, 182 S. W. Repr. 148.

C. H. Bergner, with him *Spencer Gilbert Nauman* and *J. E. B. Cunningham*, for appellee.—The regulation of defendant relief association to the effect that recovery cannot be had against the defendant on the benefit certificate after recovery of judgment against the defendant, is valid: *Johnson v. Philadelphia & Reading R. R. Co.*, 163 Pa. 127; *Beck v. Penna. R. R. Co.*, 63 N. J. L. 232 (43 Atl. 908); *Pittsburgh, Cin., Chgo. & St. Louis R. R. Co. v. Moore*, 152 Ind. 345 (53 N. E. Repr. 290); *Reese v. Penna. R. R. Co.*, 229 Pa. 340; *Mondou v. N. Y., New Haven & Hartford R. R. Co.*, 223 U. S. 1.

OPINION BY MR. JUSTICE POTTER, June 30, 1917:

This is an appeal from the refusal of the court below to enter judgment for want of a sufficient affidavit of defense.

Plaintiff, who was the widow of David Getkin, an engineer in the employ of defendant at the time of his death, declared on a certificate of membership in the Voluntary Relief Department of the defendant company, and claimed to recover, as the beneficiary named in such certificate, the sum of \$2,250 as a death benefit. She averred that all the terms and conditions of the certificate had been complied with and that, on October 21, 1912, her husband, while in the performance of his duty as a passenger engineer on one of defendant's trains which was engaged in interstate commerce, was killed under circumstances involving negligence on the part of defendant. She further averred that, as administratrix of her husband, she had, on October 9, 1913, brought an action of trespass against defendant, in the District Court of the United States for the Middle District of Pennsylvania, to recover damages for the death of her husband under the Act of Congress of April 22, 1908, 35 U. S. Stat. 65, c. 149, known as the "Employers' Liability Act," and that, on June 24, 1914, she had recovered in such action a verdict against defendant for \$7,161, which had been fully paid and satisfied. She also averred that, after the satisfaction of the verdict, she had applied to the superintendent of the relief department for payment of the death benefit under the certificate, but payment had been refused by him. The regulations of the relief department of defendant company were attached to the statement and contained the following provision:

"58. Should a member or his legal representative make claim, or bring suit, against the company, or against any other corporation which may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the relief fund, on account of the same, shall not be made until such claim shall be withdrawn or suit discontinued. Any compro-

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mise of such claim or suit, or judgment in such suit, shall preclude any claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries on account of injury or death shall operate as a release and satisfaction of all claims against the company.....for damages arising from such injury or death."

In the affidavit of defense, the recovery in the action of trespass was set up as a bar to this action under the regulation above quoted. The validity of such a regulation has been sustained in *Graft v. Balt. & Ohio R. R. Co.*, 5 Sad. (Pa.) 94; *Johnson v. Philadelphia & Reading R. R. Co.*, 163 Pa. 127; *Ringle v. Penna. R. R. Co.*, 164 Pa. 529; *Reese v. Penna. R. R. Co.*, 229 Pa. 340; *Hogarty v. Philadelphia & Reading Ry. Co.*, 255 Pa. 236.

At the time of his death, plaintiff's husband was running a train engaged in interstate commerce, so that the Act of Congress of April 22, 1908, 35 Stat. at Large, 65, c. 149, No. 5, is controlling to the extent that it has application to this case. In the fifth section of that act, it is provided that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void." But the only liability created by the act is for damages to persons suffering injury while employed by a common carrier engaged in interstate commerce. Any regulation, therefore, which enables a carrier to exempt itself from a claim for damages for injury received under the conditions mentioned is void. If the plaintiff had received payment of the benefit certificate prior to bringing suit for damages, the stipulation in the contract of membership in the relief fund could not have been permitted to defeat the right to recover damages. It is provided, however, in the act of congress, that, in such action for damages brought against a common carrier, the carrier may set off therein any sum it has contrib-

uted or paid to any insurance relief benefits, or indemnity, that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought. It is, therefore, apparent that, by the act in question, congress did not intend that there should be both payment of benefits and a recovery of damages for the injury, at least in so far as payment for both was to be made by the same defendant. In the matter of payment here, counsel for appellant seek to distinguish between the defendant company, and the beneficial association, which is merely a department or bureau of the defendant company. But the benefits are demanded from the company, and the suit to compel their payment is against it. If plaintiff is right in seeking to hold the company responsible for the payment of the benefits, it is difficult to see why it should not be credited with their payment when made. However, that question is not important here, as there is no attempt by defendant to set off any sum against the amount to which the plaintiff was entitled as damages. Defendant is merely standing upon the terms of the contract under which the benefit certificate was issued.

The present suit is not an action for damages for injuries sustained. As has already been stated, such an action was actually brought and tried in another forum, and this plaintiff, as administratrix of her husband, did in that action recover for her benefit and that of her children, if any, damages in the sum of \$7,161. So that no question of exemption or release from the payment of damages, by reason of the acceptance of benefits, can arise in this case, and there is no occasion to invoke in that respect the provision of the act of congress. The present claim is based entirely upon the contract of membership in the relief association, and that contract contains a clear stipulation that the recovery of a judgment in a suit for damages on account of injury or death of a member shall preclude any claim upon the relief

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fund, for benefits on account of such injury or death. The relief fund provides protection for its members in case of sickness or accidental injury where there may be no legal liability upon the part of the defendant company. And where there is such liability, the beneficiary has the option of accepting the sum payable under the terms of the benefit certificate, or of instituting legal proceedings, with the possibility of recovering a much larger sum, as did the plaintiff in the present case. But, under the terms of the contract, the funds of the beneficial association are not to be depleted by the payment of benefits in a case where damages are recovered for the injury or death of a member. As such a recovery was had in the present case, we think the court below was fully justified in overruling the motion for judgment for want of a sufficient affidavit of defense.

The judgment is affirmed.

Commonwealth ex rel., Appellant, v. North Shore Railroad Company.

Receivers—Corporations—Appointment—Hostile interest—Removal.

The receiver of a railroad company was properly removed on petition of creditors of the company where it appeared that he was interested in another railroad with which the former company was engaged in litigation.

Argued May 15, 1917. Appeal, No. 95, Oct. T., 1917, by plaintiff, from decree of C. P. Lawrence Co., March T., 1912, No. 11, from order vacating appointment of receiver in case of Commonwealth of Pennsylvania ex rel. Attorney General v. North Shore Railroad Company. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Petition to vacate appointment of receiver.

From the record it appeared that Henry Cook had been appointed receiver for the North Shore Railroad Company after a verdict had been rendered against the defendant in quo warranto proceedings challenging the propriety of the granting of the charter of defendant corporation.

The petition of the North Shore Railroad, by its president, alleged in part, that "your petitioner further showeth that no judgment has ever been taken on the verdict of the jury, and that the order appointing Henry Cook receiver was made without notice of any kind to your petitioner and without any application for the appointment of a receiver, so far as your petitioner is advised, and without notice to any of the creditors of the North Shore Railroad Company. Your petitioner further showeth that the said Henry Cook is not a disinterested person and would not be a disinterested receiver, and that he ought not to be appointed receiver of the North Shore Railroad Company by reason of his friendship to the Pennsylvania Company which is opposing and has heretofore opposed the interests of the North Shore Railroad Company, in that it has undertaken to acquire the property of the North Shore Railroad Company, and, in that there are now pending three cases in behalf of the North Shore Railroad Company against the Pennsylvania Company and the Pittsburgh, Fort Wayne & Chicago Railway Company, operated by the Pennsylvania Company, and that there is also one judgment recovered by the North Shore Railroad Company against the Pittsburgh, Fort Wayne & Chicago Railway Company in which W. A. McConnel, who was the attorney for the plaintiff in this proceeding, was attorney for the Pennsylvania Company and the Pittsburgh, Fort Wayne & Chicago Railway Company, the said W. A. McConnel being attorney in the three suits now pending."

The court below, EMBERY, P. J., filed the following opinion:

An appeal from the judgment and decree in this case

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was taken to the Supreme Court, and on May 15, 1917, it was ordered that the record be remitted to the court below with direction that it assign its reason for revoking the appointment of Henry E. Cook, receiver, and appointing in his stead Richard S. Holt, the record to be returned within ten days. This order, along with the record, was received by the prothonotary of Lawrence County May 24, 1917, and until that date this court had no knowledge of it.

In compliance with the above order, I assign the following reasons as matters of fact that induced the revocation of the appointment of Henry E. Cook :

First. This case was tried before Hon. W. E. PORTER, P. J., and the testimony, exhibits and charges of the court cover five hundred and twenty typewritten pages. This testimony shows at length continuous litigation between the North Shore Railroad Company and the Pennsylvania Company and Pittsburgh, Fort Wayne & Chicago Railway Company, operated by the Pennsylvania Company. It also shows at least three suits pending at the time of the making of the order in which the North Shore Railroad Company was seeking to recover damages from the Pennsylvania Company and companies controlled and operated by it. In these cases, William A. McConnel, Esq., one of the attorneys for the plaintiff in this case was, and is attorney for the Pennsylvania Company, and the companies controlled by it, in the suits pending in which the North Shore Railroad Company is plaintiff.

Second. The decree of January 1, 1916, by which the appointment of Henry E. Cook was made, was entered without application for the appointment of a receiver and without notice to the North Shore Railroad Company, its stockholders or creditors.

Third. Henry E. Cook had not qualified as receiver at the time of entering the decree revoking his appointment.

Fourth. On January 10, 1916, a petition was presented by the North Shore Railroad Company averring that

Henry E. Cook was not a disinterested person and would not be a disinterested receiver by reason of his friendship for the Pennsylvania Company. This petition recited that there were three several cases pending in which the North Shore Railroad Company was plaintiff and that there was one judgment recovered by the North Shore Railroad Company against the Pittsburgh, Fort Wayne & Chicago Railway Company in which W. A. McConnel, attorney for plaintiff in this proceeding, was attorney for the Pittsburgh, Fort Wayne & Chicago Railway Company, and that he was also attorney for the defendant in the cases pending, and praying for the revocation of the appointment of Henry E. Cook. On this petition, a rule to show cause was granted, returnable January 17, 1916, at 9 o'clock, and issue and service of this rule was waived by attorneys for plaintiff. To this rule, an answer was filed by William A. McConnel, one of the attorneys. The cause came on for argument June 13, 1916.

Fifth. At the argument of this case, a petition was presented by divers creditors and stockholders of the North Shore Railroad Company recommending the appointment of Hon. Richard S. Holt as receiver of the North Shore Railroad Company.

Sixth. From the record in the case and from the statements of counsel made at the argument, the court found, and I now find, as matter of fact, that W. A. McConnel, Esq., was attorney for the plaintiff in this proceeding and was also attorney for the Pennsylvania Company and the companies controlled or operated by it in the several suits pending in which the North Shore Railroad Company was plaintiff and the Pennsylvania Company and the Pittsburgh, Fort Wayne & Chicago Railway Company, operated by the Pennsylvania Company were defendants; that one judgment had been recovered by the North Shore Railroad Company against the Pittsburgh, Fort Wayne & Chicago Railway Company, and that W. A. McConnel was attorney for the defendant in that proceeding; that the appointment of Henry E. Cook

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was made without any application for the appointment of a receiver, and without notice to the defendant, its stockholders or creditors, and that the name of Henry E. Cook, as receiver, was suggested to the court by one of the attorneys for the plaintiff; that Henry E. Cook was not entirely disinterested, and was specially friendly to the Pennsylvania Company; that the Pennsylvania Company was specially interested in acquiring the property or part of the property, of the North Shore Railroad Company; that the friendship existing between Henry E. Cook and the Pennsylvania Company, and its attorney, was such as to raise a grave doubt as to the disinterestedness of Henry E. Cook were he to continue as receiver, and I did not deem it advisable under the facts as they appeared, to continue him in the office of receiver. I further found, and now find that Henry E. Cook had not qualified and had done nothing as receiver, or by virtue of the appointment.

Seventh. I found, and now find that Hon. Richard S. Holt had served a term as President Judge of the Thirty-sixth Judicial District; that he is an able and reputable lawyer, familiar with business propositions, and without interest in, or special friendly relations towards any of the parties interested in the proceedings, or in the winding up of the affairs of the North Shore Railroad Company.

Eighth. I found, and now find that Hon. Richard S. Holt is eminently qualified for position as receiver, and that the affairs of the company, if administered by Henry E. Cook, as receiver, would probably at all times be open to criticism.

Upon the above facts, I deemed it, and now believe it to have been the duty of the court to revoke the appointment of Henry E. Cook, and made the appointment of Hon. Richard S. Holt because I found him to be a person well qualified for the position of receiver.

The court vacated the appointment of Henry E. Cook as receiver of the petitioner and appointed Richard S.

160 COM. ex rel., Appel., v. NORTH SHORE R. R. CO.

Assignment of Error—Opinion of the Court. [259 Pa. Holt in his place. The Commonwealth of Pennsylvania appealed.

Error assigned was the order revoking the appointment.

Robert K. Aiken and *W. A. McConnel*, for appellant.

J. Norman Martin, of *Martin & Martin*, for appellee.

PER CURIAM, June 30, 1917:

The reasons given by the learned court below for vacating the appointment of Henry E. Cook, as receiver, and appointing in his stead Richard S. Holt, are good and sufficient.

Appeal dismissed at appellant's costs.

Noecker, Appellant, v. Woods.

Constitutional law—Constitution of Pennsylvania—Schedule to the Constitution, Sec. 14—Judicial districts—Designation—Act of April 24, 1917, P. L. 95—Validity.

1. Section 14 of the Schedule to the Constitution of Pennsylvania, providing that the general assembly shall at the next succeeding session after each decennial census and not oftener, designate the several judicial districts as required by this Constitution, is mandatory in form, and indicates a clear intention on the part of the framers of the Constitution, and of the people who adopted it, that judicial apportionment acts are to be passed at definitely designated sessions of the legislature.

2. What the Constitution specifically requires to be done by the legislature at a definitely designated session cannot be done at any other.

3. It is always to be presumed that the legislature performs the duties enjoined upon it by the Constitution, and when a session immediately succeeding a decennial census is allowed to pass without the enactment of a judicial apportionment act, a fair presumption is that the legislature intended to readopt the existing judicial apportionment for the succeeding ten years. In such

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case the judicial districts of the State as then constituted must continue until the session next succeeding the next decennial census.

4. The Act of April 24, 1917, P. L. 95, designating the several judicial districts of the Commonwealth and providing for the election and commission of judges learned in the law therefor, violates Section 14 of the Schedule to the Constitution, in that it was not passed at the next session of the legislature succeeding a decennial census and is void.

Argued June 30, 1917. Appeal, No. 5, May T., 1918, by plaintiff, from decree of C. P. Dauphin Co., Equity Docket No. 603, and Commonwealth Docket, 1917, No. 94, dismissing bill in equity for an injunction in case of F. M. Noecker v. Cyrus E. Woods, Secretary of the Commonwealth of Pennsylvania. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHISKER, FRAZER and WALLING, JJ. Reversed.

Bill in equity for an injunction. Before KUNKEL, P. J., and MCCARRELL, J.

The opinion of the Supreme Court states the facts.

The court dismissed the bill. Plaintiff appealed.

Error assigned was the decree of the court.

J. E. B. Cunningham, with him *Spencer Gilbert Nauman*, *B. F. Geary* and *C. H. Bergner*, for appellant.—The legislature of Pennsylvania has no power to designate the several judicial districts of the State, except at a session next succeeding a decennial census.

The Act of April 24, 1917, P. L. 95, is violative of Section 14 of the Schedule of the Constitution: Com. ex rel. Chase v. Harding et al., 87 Pa. 343; Com. ex rel. Burns v. Handley et al., 106 Pa. 245; Com. ex rel. v. Heck, 251 Pa. 39; Rumsey v. People, 19 N. Y. 41; State ex rel. Meighen v. Weatherill, 147 N. W. Repr. 105; People ex rel. Carter v. Rice, 135 N. Y. 473; In re Reynolds, 202 N. Y. 430.

William H. Keller, First Deputy Attorney General, with him *Francis Shunk Brown*, Attorney General, for appellee.—The Judicial Apportionment Act of April 24, 1917, P. L. 95, is not in contravention of Section 14 of the Schedule to the Constitution.

The case of *Commonwealth ex rel. v. Heck*, 251 Pa. 39, is distinguishable from the case at bar.

The Constitution does not require that the legislature shall make a new judicial apportionment every ten years and at no other time, but only that it shall not make a judicial apportionment oftener than once after each decennial census: *Com. v. Clark*, 7 W. & S. 127; *Com. v. Maxwell*, 27 Pa. 444; *Rumsey v. People*, 19 N. Y. 41; *State ex rel. Meighen v. Weatherill*, 147 N. W. Repr. 105; *In re Reynolds*, 96 N. E. Repr. 87; *People ex rel. Heffernan v. Carlock*, 65 N. E. Repr. 109; *People ex rel. Carter v. Rice*, 31 N. E. Repr. 921; *Legislative Reapportionment*, 21 Pac. Repr. 480.

PER CURIAM, July 20, 1917:

And now, July 20, 1917, the court being of opinion that the Act of Assembly, approved April 24, 1917, entitled "An act to designate the several judicial districts of the Commonwealth as required by the Constitution, and to provide for the election and commissioning of judges learned in the law in said districts," is unconstitutional and void, the decree of the court below is reversed, the demurrer to appellant's bill is overruled, and *Cyrus E. Woods*, secretary of the Commonwealth, is restrained and enjoined from sending to the county commissioners of Clinton County a notice designating the office of judge of the Court of Common Pleas of the 57th judicial district, as an office for which candidates are to be nominated in Clinton County at the fall primary in the year 1917, the costs below and on this appeal to be paid out of funds of the Commonwealth under the control of the appellee. An opinion setting forth the reasons for this decree will be filed at a later date.

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OPINION BY MR. CHIEF JUSTICE BROWN, October 15, 1917:

On April 24, 1917, the Governor approved an act of assembly, entitled "An act to designate the several judicial districts of the Commonwealth as required by the Constitution and to provide for the election and commissioning of judges learned in the law for the said districts." The fourteenth section of the schedule of the Constitution, which is a substantive part of that instrument, provides that "The General Assembly shall, at the next succeeding session after each decennial census and not oftener, designate the several judicial districts as required by this Constitution." Notwithstanding this plain provision, the general judicial apportionment Act of July 18, 1901, dividing the State into fifty-six judicial districts, was still in force when the legislature met this year. The only change made by the Act of April 24, 1917, in the districts as designated by the Act of 1901, is the creation of Clinton County as a separate judicial district. It has a population of less than forty thousand, and, at the time of the approval of the Act of 1917, formed, with Cameron and Elk Counties, the twenty-fifth judicial district. By the Act of 1917 it is made the fifty-seventh. F. M. Noecker, one of its resident taxpayers, filed a bill in the court below, averring that the Act of 1917 is unconstitutional, (1) in that it is violative of the fourteenth section of the schedule of the Constitution, and (2) because it violates Section 5, Article V, of the Constitution, which provides as follows: "Whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district, and shall elect one judge learned in the law: and the General Assembly shall provide for additional judges, as the business of the said districts may require. Counties containing a population less than is sufficient to constitute separate districts shall be formed into convenient single districts, or, if necessary, may be attached to contiguous districts as the General Assem-

bly may provide." The prayers of the bill are for a decree declaring the Act of 1917 unconstitutional and void, and enjoining the secretary of the Commonwealth from giving notice to the county commissioners of Clinton County that the office of judge of the Court of Common Pleas of the fifty-seventh judicial district is an office for which candidates are to be nominated in said county at the fall primary of the present year. To this bill the attorney general demurred, on the ground that the Act of 1917 is constitutional. The demurrer was sustained under a stipulation that the action of the court on the demurrer should be regarded as a final disposition of the case. On this appeal from the dismissal of the bill the same objections to the constitutionality of the Act of 1917 are renewed.

The words, "the General Assembly shall, at the next succeeding session after each decennial census and not oftener, designate the several judicial districts as required by this Constitution," are mandatory in form, and indicate a clear intention on the part of the framers of the Constitution, and of the people who adopted it, that judicial apportionment acts are to be passed at definitely designated sessions of the legislature. The reason for this requirement is obvious. The judicial apportionment of the State has for its basis the population of the various counties, and the one session of the legislature at which an apportionment can be made with fairness and a degree of accuracy is the one next succeeding the taking of a decennial census. If a judicial apportionment act can be passed at any session of the legislature succeeding the one immediately following such a census, the words, "the next succeeding session," are utterly without meaning. They were used for a purpose which is not to be thwarted by giving them the strained meaning of "at any succeeding session." They mean, in common parlance, "immediately succeeding," or "immediately following," and are to be so interpreted. It is, therefore, to be concluded that what the Constitution

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specifically requires, for a very good reason, to be done by the legislature at a definitely designated session, cannot be done at any other. It is always to be presumed that the legislature performs the duties enjoined upon it by the Constitution, and when a session immediately succeeding a decennial census is allowed to pass without the enactment of a judicial apportionment act, a fair presumption is that the legislature intended to readopt the existing judicial apportionment for the succeeding ten years; but, be this as it may, the legislature not having passed a judicial apportionment act at the session of 1911, the judicial districts of the State as now constituted must continue until the session of 1921.

Nothing decided in *Com. v. Clark*, 7 W. & S. 127, and *Com. v. Maxwell*, 27 Pa. 444, two of our cases cited by the learned attorney general and his deputy is in conflict with the foregoing view. The eighth section of the sixth article of the amended Constitution of 1838 declared that all officers whose election or appointment was not provided for in that instrument should be elected or appointed as might be directed by law. The election or appointment of canal commissioners was not provided for in the Constitution, and it was therefore to be provided for by law. By section eleven of the schedule appended to the Constitution it was provided that the appointing power should remain as theretofore; that all officers in the appointment of the executive department should continue in the exercise of the duties of their respective offices until the legislature should pass such laws as might be required by the eighth section of the sixth article of the Constitution. The same section of the schedule directed that those laws were to be enacted by the first legislature under the amended Constitution. In *Commonwealth v. Clark*, Clark was elected a canal commissioner in 1843, under the provisions of an act of assembly passed April 18th of that year, providing for the election of canal commissioners. The proceeding to oust him was instituted on the ground that the said act of assembly was wholly un-

constitutional and void, because it had not been enacted by the first legislature that met after the Constitution had been amended. If the language in the schedule which so provided had been construed as mandatory, and the contention of the Commonwealth had prevailed, the eighth section of the sixth article of the Constitution could never have been given effect. If, under our Constitution, a legislature, at a session next succeeding the taking of a decennial census shall not apportion the State into judicial districts, there will be a disregard of mandatory provision of the Constitution, but such disregard will not affect the constitutional direction that judicial power in the lower courts shall be administered through judicial districts. What is said of Commonwealth v. Clark applies equally to Commonwealth v. Maxwell. The several cases from other jurisdictions cited by counsel for appellee are all distinguishable from the one now under consideration. A reference to a single one will suffice. In State v. Wetherill, 147 N. W. Repr. 105 (Minnesota), the court said: "The difference between the language of our Constitution and that of the constitution of the other states is found in the fact that by the language of the latter the legislature is commanded to make the reapportionment at the first session after the census, while in our State the language is that the legislature shall have the power to reapportion at that session." The words "shall have the power" merely authorize; the word "shall" is mandatory.

We have distinctly and most properly held that the life of a judicial apportionment act is ten years. "Now we are prepared to see the relevancy and effect of the fourteenth section of the schedule, which seems to be out of place, but which has no ambiguity in its interpretation. It reads thus: 'The General Assembly shall at the next succeeding session after *each* decennial census, and *not oftener*, designate the several judicial districts, as required by this Constitution.' The italics I

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have made mark its operation. The duty recurs after *each* census, but not oftener. It is evident the convention intended to confine the *arrangement* of districts to *decennial* periods when the *census* would authoritatively, and with certainty, declare the population of each county": AGNEW, C. J., in Commonwealth ex rel. Chase v. Harding, 87 Pa. 343. A few years later, in Commonwealth ex rel. Burns v. Handley, 106 Pa. 245, Mr. Justice CLARK thus refers to the Harding case: "In Commonwealth ex rel. Chase v. Harding, 6 Norris 343, it was decided that this provision, when a county attains that number of inhabitants, does not of itself constitute it a separate district; but simply indicates a certain basis upon which, at the proper time and in the proper manner, judicial districts may be declared by the legislature. This was the precise question settled in that case; that it was correctly decided we have no doubt. . . . "The General Assembly shall, at the next succeeding session after each decennial census, and not oftener, designate the several judicial districts, as required by this Constitution.' This section belongs properly to the body of the Constitution; it is not, in any proper sense, a schedule provision; it was not intended merely to bridge the space between the old and the new systems; it is an important member of the system itself. Its design is to provide for a designation of the several judicial districts throughout the Commonwealth at regular or periodical intervals of ten years, and to prohibit any further or other designation within these decennial periods. The arrangement of judicial districts, thus provided for, is a conclusive one; it cannot be afterwards disturbed or interfered with during the period for which it is declared." Following the two foregoing cases the writer said, with the approval of the entire court, in Commonwealth ex rel. Brown v. Heck, 251 Pa. 39, that the judicial districts of the State cannot be changed by the legislature, session after session, but only at intervals of ten years, as the changes in popula-

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tion may require. With it thus definitely settled that a judicial apportionment act cannot be changed within the ten years succeeding its passage, if the legislature, at the recent session, had passed such a valid act, it would have to continue until 1927, and the legislature to assemble in 1921—the year after the decennial census of 1920—could not obey the constitutional direction to then designate the several judicial districts of the State. That duty can be then performed with the unconstitutional Act of 1917 out of the way.

As, for the reason stated, the Act of April 24, 1917, is in violation of a constitutional requirement, the second objection to its constitutionality need not be considered. In support of the decree of July 20, 1917, this opinion is filed.

Moran, Appellant, v. The General Fire Extinguisher Company.

Negligence—Master and servant—Safe place to work—Fall—Subcontractors—Injuries to workmen—Liability.

1. Where an employer, in disregard of actual or constructive notice of a defect in the supports on which his work is designed to rest, proceeds without correcting the same and injury results to his employee in consequence of this disregard, the law will hold him guilty of culpable negligence, but no legal presumption of negligence arises in the first instance from the accident itself, to take the place of proof of negligence or to shift the burden of proof.

2. A master is not liable for the injury to his servant caused by hidden defects or dangers in the machinery, appliances or premises furnished to a servant, when such defects or dangers were unknown to the master and were not discoverable by the exercise of reasonable care and skill in inspecting them and when there is nothing in external appearances to create a suspicion of their presence.

3. A manufacturing company was enlarging its plant under a contract with an experienced builder, in accordance with plans and specifications prepared by competent architects. It made a

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separate contract with a fire extinguishing company for the erection of a fire extinguishing apparatus, which included the construction of a tank upon foundations and supports to be provided by the manufacturing company. The contract for the tank was sublet by the fire extinguishing company and a suitable tank was erected upon the supports. The tank was filled with water and while a workman in the employ of the fire extinguishing company was at work beneath the tank, the supports gave way, and the tank fell causing serious injury to such workman. The fire extinguishing company had no notice that the supports were insufficient. In an action against the fire extinguishing company brought by such workman plaintiff contended that defendant had failed to furnish him with a safe place to work. The court decided that the defendant was not liable for defects in the supports, of which it was not aware and over which it had no control, and directed a verdict for defendant upon which judgment was entered. *Held*, no error.

Argued March 21, 1917. Appeal, No. 391, Jan. T., 1916, by plaintiff, from judgment of C. P. No. 5, Philadelphia Co., March T., 1913, No. 827, on directed verdict for defendant, in case of William Moran v. The General Fire Extinguisher Company. Before BROWN, C. J., STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before MARTIN, P. J.

The opinion of the Supreme Court states the facts.

Verdict for defendant by direction of the court and judgment thereon. Plaintiff appealed.

Errors assigned were rulings on evidence and in directing a verdict for defendant.

John G. Kaufman, with him *Walton Pennewill* and *V. Gilpin Robinson*, for appellant.—Defendant did not provide plaintiff with a reasonably safe place in which to work, and is, therefore, liable to him for injuries sustained in consequence of its neglect in this respect: *Killweyer v. Forged Steel Wheel Co.*, 243 Pa. 110;

Cogle v. McKee et al., 151 Pa. 602; Carr v. General Fire Extinguisher Co., 224 Pa. 346.

There is abundant evidence that the supports were improperly constructed and that the structure was an unusual one: Cooper v. Robischung Bros., 155 S. W. Repr. 1050; Ott v. General Fire Extinguisher Co., 226 Pa. 337.

The case of Israel v. Lit Brothers, 248 Pa. 463, has no application to the facts of the case.

Frank P. Prichard, with him *James Wilson Bayard* and *John G. Johnson*, for appellee.—The injury was due to defects in the construction of the building, for which the defendants could not be held responsible: Israel v. Lit Bros., 248 Pa. 463.

OPINION BY MR. JUSTICE STEWART, October 8, 1917:

The action was for the recovery of damages for injuries sustained by plaintiff while in the employment of the defendant company and engaged in the line of his duty. The claim is based on alleged negligence of the defendant in failing to provide a place reasonably safe for plaintiff while engaged at his work. The business of the defendant, as its name indicates, was the equipping of buildings with an improved sprinkler system for fire protection. A thread company operating a plant in Philadelphia determined on an enlargement of its plant by the construction of an additional story and the building of a fire tower in connection with the plant proper, the latter being designed to support a tank to be used for the storage of water. It entered into a contract with an experienced builder for the erection of the additions in accordance with the plans and specifications prepared by competent architects, and into a separate contract with the defendant company for the equipment of the plant with its sprinkler system, which included among other things the construction and erection of a white cedar water tank with a capacity of 20,000

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gallons, upon foundations and supports to be provided by the owners. The defendant company sublet the building of the tank to an independent contractor long experienced in the business. Upon the completion of the building proper the defendant entered for the purpose of installing its sprinkler system. It had put in place a large water tank on the supports provided, and had introduced its entire system in the building, when, for the purpose of testing its sufficiency, it caused the water to be turned into the tank on the afternoon of December 26, 1911, to the depth of four feet, and on the morning following it caused the tank to be filled to its capacity. About an hour thereafter the foundation or supports on which the tank rested gave way, and the whole structure, including the tank, fell to the ground, and the plaintiff, who was at the time engaged in doing some work on pipes beneath the tank, was seriously injured by the collapse. At the close of plaintiff's case, the trial judge, affirming the ninth point submitted by the defendant, gave binding instructions in favor of the defendant and a verdict was rendered accordingly. The appeal raises but a single question calling for our consideration: Did the evidence submitted by the plaintiff touching the negligence charged show a case requiring submission to the jury? That the collapse which occasioned the plaintiff's injury resulted from a defective construction of the base on which the water tank was to rest, is conceded. There is a diversity of view, however, expressed as to just what the defect was that was the initial operating cause; but the witnesses all agreed that the base, constructed as it was, and as the event proved, was inadequate for the support of the tank carrying 20,000 gallons of water. There is not a suggestion that the collapse occurred because of any defect or imperfection in any of the work done or materials furnished by the defendant; these conformed in all respects to the plans and specifications. The defendant had nothing whatever to do in furnishing the supports

for the tank. So that it may clearly appear what the issue was, we quote from the plaintiff's statement of claim. After reciting the facts we have given, it proceeds: "Whereupon it then and there became the duty of the said defendant, before permitting the said work to be so placed and filled with water, to ascertain and provide that the supports of the said tank be sufficient to safely carry the weight of the said tank and water it was designed to contain, and that said tank was properly superimposed upon said supports, and thereby to observe its duty to furnish to the plaintiff and other employees reasonably safe premises in which to perform their duties and work." We may dismiss from consideration so much of the statement as by innuendo suggests that the tank was not properly superimposed upon the supports. Nowhere in the evidence do we find a suggestion that the collapse was due to any such circumstance, or that in point of fact any such circumstance existed. With this feature of the case eliminated, the only negligence charged was failure on the part of the defendant before permitting the tank to be put in place and filled with water to ascertain and provide that the supports were sufficient to safely carry the weight of tank and water the latter was designed to contain. If any such legal duty rested on the defendant, then manifestly the case was one for the jury, and on the evidence it was error to withhold it. We know of no legal principle from which any such rule of duty as is here sought to be applied can be derived; nor do we know of any accepted authority which asserts it. True it is that where an employer in disregard of actual or constructive notice of a defect in the supports threatening danger on which his work is designed to rest, proceeds without correcting the same and injury results to his employee in consequence of this disregard, the law will hold him guilty of culpable negligence; but in such case no legal presumption of negligence arises in the first instance from the accident itself to take the place of

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proof of negligence or to shift the burden of proof. *Allison Manufacturing Co. v. McCormick*, 118 Pa. 519; *McKenna v. William H. Nixon Paper Co.*, 176 Pa. 306. An indispensable condition of plaintiff's right to recover is that the evidence discloses such facts as will warrant a reasonable inference that the injury resulted directly from a failure of duty on the part of the employer. There are cases where certain facts being shown, or admitted, the law will presume negligence, such as involve neglect of a statutory duty and the like; but in the present case not a single fact alleged or proved is in itself inconsistent with the plaintiff's entire freedom from responsibility in connection with the accident, and therefore the real and only question in the case is, what was the measure of this defendant's duty towards the plaintiff as its employee, for until this be ascertained, the question of its negligence admits of no discussion. Once this is ascertained the question of negligence is to be determined in the light of the evidence adduced or the admitted facts. This measure of duty is nowhere more clearly and satisfactorily defined than in *Thompson's Commentaries on the Law of Negligence*, where in Sec. 3785 it is said: "Judicial holdings unite upon the proposition that the master is not liable for an injury to his servant caused by hidden defects or dangers in the machinery, appliances or premises furnished to a servant, when such defects or dangers were unknown to the master and were not discoverable by the exercise of that reasonable care and skill in inspecting them already spoken of, and when there is nothing in external appearances to create a suspicion of their presence; otherwise, if the defect could have been discovered by the exercise of reasonable or ordinary care or diligence." In the light of this clear statement of the law, how stands the present case? As between the owner of the premises and the defendant company, upon the facts of the case, the latter stands free from all liability; he had no share in the construction of the tower, foundations or supports,

or any part of the building; by his contract with the owner, the latter was "to provide and erect a suitable foundation of sufficient strength and proper elevation of twenty feet above the highest sprinkler to safely support the 20,000 gallon gravity tank." As between the defendant company and this plaintiff, notwithstanding the fact that defendant had sublet to an independent contractor the work of constructing and putting in place upon the supports provided by the owner of the water tank, it did not therefore escape from the duty of exercising reasonable or ordinary care to the end that the place assigned its employee to work might be in such condition that its employee would not be exposed to personal injury, such duty being non delegable; in other words, that to this extent the subcontractor and his employees were the agents and servants of the defendant company, and for their failure of duty in the particular mentioned resulting in injury, the defendant would be liable. As between the subcontractor and the defendant company, the liability would rest on the former by the terms of their contract, but with that contract the plaintiff and employee had nothing to do. So then, accepting appellant's theory of the case, what failure of duty on the part of the subcontractor as the defendant's agent and its immediate employees, can be derived from the evidence? It was upon supports provided by the owner of the premises that the tank was to be erected. These were provided by the owner and upon them the tank was placed. Concededly at this time there was nothing in external appearances to create a suspicion of insufficiency in the supports on which the tank was to rest. The tank was put in place under the direct supervision of the subcontractor's foreman, who for eighteen years had been accustomed to this kind of work. This man testified that he saw nothing unusual in the construction of the supports, nothing to indicate to him that there was danger in placing the tank upon them, and that if there had been anything out of the ordinary he would have

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stopped the erection of the tank. The man who had built the tower and placed everything in position for the tank to rest upon testified that there was nothing apparent to him or any other experienced mason that there was any danger of the tank falling. The testimony makes it very clear that nothing short of an exhaustive expert examination would have disclosed the defects which caused the collapse. No duty rested on the defendant to make such examination. With the tank once in place, the work of the subcontractor was complete and the next step taken was under the direction of the defendant's own immediate employees—the testing of the sufficiency of the tank itself, not of the adequacy of the supports on which it was placed. Unquestionably the collapse resulted from the inadequacy of the latter, but here again from what facts appearing in the evidence would a jury be justified in finding that the exercise of ordinary prudence would have suggested to the defendant company the danger in filling the tank to the limit of its capacity? Every one concerned knew that the tank was designed to carry 20,000 gallons of water, the builder knew it or must be held to have known it; the owner certainly knew it, as did the architects. What reason could this defendant have, under the conditions stated, for distrusting the technical skill of these experienced men, particularly the technical skill of the builder, and undertaking an investigation itself for latent defects in the structure, for which it did not pretend to be qualified by experience or professional skill? It nowhere appears that in the course of such business—installing sprinkling apparatus—it is customary or usual for the parties installing the same to examine into the sufficiency of the tank supports provided by the owner, and the duty resting upon such an one, in the absence of express or constructive notice to him, means no more than that it is to be observant of such defects threatening danger as are exposed to view. The case presents no features which distinguish it in law from the case of

Allison Manufacturing Co. v. McCormick, *supra*. In that case it is said: "The work at which McCormick was employed was not a dangerous work; the place was not one that could be regarded as in any sense dangerous. The materials were those in common use for the purpose for which they were used by the defendant. The work was done under the supervision of a competent painter. The accident happening under such circumstances was without the range of ordinary experience, and one, therefore, against which the measure of due care from the employer could not protect the servant. To hold otherwise would be to disregard the well-settled law upon the subject and to make the employer an insurer of the safety of his employee." We are of opinion that the case was correctly ruled in the court below, and the judgment is accordingly affirmed.

Buckley, Appellant, v. Holmes et al.

Elections—Judges—Orphans' Court judges—Constitutional law—Constitution of Pennsylvania, Art. V, Sec. 25; Art. VIII, Sec. 2—Constitutional Amendments of 1909, P. L. 948—Time of election.

1. An Orphans' Court judge is not a judge of a designated judicial district of a state, but of the court of the county in which he resides. If there be one of two, three or four counties, constituting a single judicial district, such judge is not a judge of that district with jurisdiction extending all over it, as in the case of each of the Common Pleas judges within it. His jurisdiction is limited to the county in which his court exists.

2. The intent of the sixth constitutional amendment of 1909, (P. L. 948), was to eliminate the spring election and to continue the constitutional provisions for the election of local or municipal officers on a day different from that on which general State officers are elected; judges of the several judicial districts are State officers but the duties which they perform are local and under the sixth amendment of 1909 they are in the class of officers to be elected at the municipal elections.

3. It is the intent of such amendment that Orphans' Court

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judges of the State are to be elected at the same time that elections are held for judges of the courts for the several judicial districts and for county, city, ward, borough and township officers for regular terms of service, and it is not material that they are not judges of the courts for the several judicial districts or that there are no provisions in the Constitution, other than the sixth amendment of 1909 (P. L. 948), under which they can be elected.

4. Under Section 25 of Article V, and Section 8 of Article IV of the Constitution, where a vacancy happens by reason of death in a court of record within three months prior to the next election for judges, the vacancy is to be filled by appointment by the governor until the first Monday of January next succeeding the second election for judges after the occurrence of such vacancy, and this provision has not been made inoperative by the sixth amendment of 1909, amending Section 8 of Article IV, and providing that in the case of a vacancy in an elective office, the person appointed by the governor to fill it shall be succeeded by someone chosen on the next election day appropriate for such office, unless the vacancy shall happen within two calendar months immediately preceding such election, in which case the election for said office shall be held on the second succeeding election day appropriate for such office.

5. A judge of the Orphans' Court died within three months and more than two months prior to the next election for judges. Nomination petitions were prepared nominating certain persons as candidates for the vacancy caused by the death of such judge. In a suit in equity brought by a taxpayer to enjoin the county commissioners from printing the names of the nominees mentioned in such petition upon the ballots, the lower court dismissed the bill. *Held*, that the vacancy caused by the death of such judge could not be filled at the next election for judges, but must be filled by the governor, the incumbent holding office until the first Monday of January following the second election for judges held after the occurrence of such vacancy, and the decree was reversed with directions to grant the relief prayed for.

Argued Sept. 24, 1917. Appeal, No. 274, Jan. T., 1917, by plaintiff, from decree of C. P. No. 1, Philadelphia Co., June T., 1917, No. 5686, dismissing bill in equity for an injunction, in case of F. Pierce Buckley v. George F. Holmes, Robert J. Moore and Harry Kuenzel, City Commissioners for the County of Philadelphia. Before

BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHIZISKER, FRAZER and WALLING, JJ. Reversed.

Bill in equity for an injunction. Before PATTERSON, J.

From the record it appeared that F. Pierce Buckley filed, in the court below, the following bill against George F. Holmes, Robert J. Moore and Harry Kuenzel, City Commissioners for the County of Philadelphia :

"To the Honorable the Judges of said Court:

"Your orator complains and says:

"First.—I am a citizen of the United States and of this Commonwealth, a resident of the City and County of Philadelphia, and an owner of real and personal property in said city and county upon which I am required to and annually do pay taxes to said city and county and also to said Commonwealth, which said taxes will be wrongfully increased and I will be compelled to pay such wrongful increase if the defendants make the expenditures hereinafter specified.

"Second.—The defendants are the city commissioners of the County of Philadelphia, charged by law with the duty of preparing, printing and distributing the sample and official ballots to be voted by the electors of said city and county at every election, including those to be used at the municipal election to be held on the sixth day of November of this year.

"Third.—On November 2, 1915, Hon. Morris Dallett was elected a judge of the Orphans' Court for the County of Philadelphia, one of the courts of record of this Commonwealth, to serve for the term of ten years from the first Monday of January, 1916, was duly commissioned for said term, duly qualified himself for and entered upon the performance of the duties of said office, and continued therein until his death on August 23, 1917.

"Fourth.—By reason of his death more than two months, but less than three months prior to the election

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to be held on November 6, 1917, a grave and important public question has arisen, viz, is the vacancy thus occasioned to be filled by the electors at said election? Unless said question is judicially determined prior to the time for printing the ballots for said election great and unnecessary expense will be incurred, and because of the fact that two other vacancies will exist and have to be filled thereat owing to the expiration of the terms of office of Hon. JOSEPH F. LAMORELLE and Hon. EDWARD A. ANDERSON, two other of the judges of said court, unless said question is decided prior to the holding of said election great confusion and uncertainty will result owing to the fact that the electors will not know how many judges are to be elected to said court at said election, many ballots may be rejected and not counted because in fact three are voted for by the electors, and many electors may lose a portion of their right of suffrage by voting for but two judges when three are to be elected.

"Fifth.—By Article V, Section 25, of the Constitution of this Commonwealth, it is provided as follows:

"Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment of the governor, to continue until the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of said vacancy."

"At the time of the adoption of the Constitution, it was provided by Article VIII, Section 2, that

"The general election shall be held annually on the Tuesday next following the first Monday of November'.....

"That provision, however, was amended by amendment five of the amendments of 1909 (P. L. 948) so as to read as follows:

"The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year'.....

"The provision last quoted when applied to Article V,

Section 25, above quoted, would require the vacancy caused by the death of Judge DALLETT to be filled by the electors at the election to be held on November 5, 1918; but by amendment six of the amendments to the Constitution of 1909 (P. L. 948) adopted at the same time as the amendment last above quoted, Article VIII, Section 3, of the Constitution is amended to read as follows:

“All judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require. All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the general assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto; provided, that such election shall always be held in an odd-numbered year.’

“Nowhere is it defined by any of the amendments of 1909, what courts are ‘courts for the several judicial districts,’ but by Sections 4 and 5 of Article V, of the Constitution as originally adopted, and Sections 13 and 14 of the Schedule thereto, the only courts which were courts for ‘judicial districts’ were the several Courts of Common Pleas of the Commonwealth, and the only ‘judges of the courts for the several judicial districts,’ were judges of the said Courts of Common Pleas. Said judges of the said Courts of Common Pleas became *virtute officii* judges of the Orphans’ Court of the particular counties of their districts by Article V, Section 9, of the Constitution, until a county had a population exceeding 150,000, or until, notwithstanding a lesser population existed, the general assembly decided that it needed a separate Orphans’ Court, when by Article V, Section 22, a separate Orphans’ Court was created for that county. By virtue of said provision all Orphans’ Courts became and were Orphans’ Courts for particular

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counties, and never for any judicial district; and (with the single exception of certain language appearing in the Act of June 7, 1917), such has been the continuous and uninterrupted title given to said Orphans' Courts and the judges thereof by the legislative and executive departments of the State government in all their official actions ever since the adoption of the present Constitution of this Commonwealth. I therefore aver that amendment six of the amendments of 1909, above quoted, does not apply to the vacancy caused by the death of Judge DALLETT, but that the vacancy is to be filled by the electors of this county at the election to be held November 5, 1918.

"Sixth.—By amendment one of the amendments of the Constitution of 1909 (P. L. 948) it is provided as follows:

" 'He (the Governor), shall nominate and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint a Secretary of the Commonwealth and an Attorney General during pleasure, a superintendent of public instruction for four years, and such other officers of the Commonwealth as he is or may be authorized by the Constitution or by law to appoint; he shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the senate, by granting commissions which shall expire at the end of their next session; he shall have power to fill any vacancy that may happen, during the recess of the Senate, in the office of auditor general, State treasurer, secretary of internal affairs or superintendent of public instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office accord-

ing to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office. In acting on executive nominations the Senate shall sit with open doors, and, in confirming or rejecting the nominations of the Governor, the vote shall be taken by yeas and nays and shall be entered on the journal.'

"By Article V, Section 25, of the Constitution, which Section never has been amended, it is provided as follows:

"'Any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment of the Governor, to continue until the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of said vacancy.'

"I aver that there are other judicial offices than judges of courts of record, and that under said provisions vacancies in courts of record cannot be filled at the next election appropriate to the election of such judges, unless that vacancy occurred more than three months prior to said election, and that vacancies in judicial offices other than courts of record can be filled at the next election appropriate to the election of such officers if the vacancy occurred not less than two months prior to said election. And I further aver that as Judge DALLITT was a judge of a court of record, and as his death did not occur three or more months before the election to be held November 6, 1917, the vacancy caused thereby cannot be filled at said election, no matter what construction be given to the constitutional provisions set forth in the fifth paragraph of this bill.

"Seventh.—By Section 5 of the Act of July 24, 1913, P. L. 1001, as amended by the Act of May 18, 1917, P. L. 135, it is provided that nomination petitions for judges of courts of record shall be filed 'at least forty days prior

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to the primary,' which primary is to be held this year on the 19th day of September. The death of Judge DALLETT as above stated, occurred less than 'forty days prior to the primary.' By Section 15 of the said Act of 1913, it is provided that where vacancies are to be filled at the election immediately following a primary, and it is too late to file nominating petitions for that primary, that nominating petitions may be filed, and the names of the candidates specified therein shall be printed on the official ballot for the general election then next ensuing, without those persons being nominated at any primary election.

"Eighth.—A large number of persons, claiming that the vacancy caused by the death of Judge DALLETT is to be filled at the election to be held on November 6, 1917, have applied for and obtained nominating petitions and intend to have them duly signed, certified and filed for the purpose of having the names of the nominees specified therein placed upon the official ballot for said election; and the defendants averring that the questions raised are judicial questions which ought not to be decided by them, have announced their determination to print all said names upon the official ballot for said election, unless restrained from so doing by a decree of court. The effect of printing said names upon the official ballot will be to largely increase the size thereof, to largely increase the difficulty of properly marking the ballot; and to largely add to the expense of said printing, which increased expense will have to be borne by your orator and the other taxable citizens and inhabitants of this county and State.

"Wherefore needing equitable relief your orator prays:

"1. That the defendants and each of them be perpetually enjoined and restrained from printing upon the official ballot for the election to be held November 6, 1917, any name or names whatsoever of persons nominated for the office of judges of the Orphans' Court of Philadel-

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"2. That it be decreed at what election the vacancy in said Orphans' Court, caused by the death of the Hon. MORRIS DALLETT, shall be filled.

"3. That such other relief be granted your orator as the facts shall warrant."

An answer to the bill was filed concurrently with the bill, and, on the same day, the bill was dismissed without any opinion by the court setting forth the reasons for its action. Plaintiff appealed.

Error assigned was the decree of the court.

William A. Hayes, for appellant.

Alex. Simpson, Jr., for appellees.

OPINION BY MR. CHIEF JUSTICE BROWN, October 15, 1917:

By the Act of May 19, 1874, P. L. 206, the Orphans' Courts of the State are made courts of record. Under Section 25 of Article V of the Constitution, "any vacancy happening by death, resignation or otherwise, in any court of record, shall be filled by appointment by the Governor, to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy." This provision remains unchanged, and, but for certain amendments to others in the Constitution, it could not be questioned that the successor of Judge DALLETT—who died August 23, 1917,—would be an appointee of the Governor, to serve until the first Monday of January after the general election in 1918, when a successor would be elected by the electors of the county.

Section 2, Article VIII, of the Constitution, as origi-

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nally adopted, provided that the general election should be held annually on the Tuesday following the first Monday of November, and section three of the same article directed that all elections for city, ward, borough and township officers, for regular terms of service, should take place on the third Tuesday of February. These two provisions have been changed by the fifth and sixth amendments of 1909, and now read as follows: "Section 2. The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto: Provided, That such election shall always be held in an even-numbered year." "Section 3. All judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require. All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto: Provided, That such election shall always be held in an odd-numbered year."

The February election has been abolished, and there is now but one election each year, held on the Tuesday following the first Monday of November. The general election is biennial in each even-numbered year; the municipal, on the same day in odd-numbered years. The first question to be considered is, at which of these elections are Orphans' Court judges elected?

By the amendments of 1909 it was intended to get rid of the spring election and to continue the constitutional provision for the election of local or municipal officers on a day different from that on which general State officers are elected. While judges of the several judicial

districts are State officers, they are compelled to reside in the districts for which they are elected, and the duties which they regularly perform are local. It was doubtless for this reason that they were included, under the sixth amendment of 1909, in the class of officers to be elected at municipal elections. If this be true of Common Pleas judges, it is certainly no less true of an Orphans' Court judge, whose jurisdiction is peculiarly local. Every act of assembly creating a separate Orphans' Court speaks of it as the court of the county in which it is established, and the same is true of the acts creating additional Orphans' Court judges in the Counties of Allegheny and Philadelphia. Vide Acts of June 13, 1883, P. L. 97; March 28, 1895, P. L. 31; April 11, 1901, P. L. 71; May 2, 1901, P. L. 117; July 11, 1901, P. L. 655; July 11, 1901, P. L. 657; May 25, 1907, P. L. 260; May 5, 1881, P. L. 12; April 28, 1887, P. L. 72; March 22, 1907, P. L. 26. An Orphans' Court judge is not a judge of a designated judicial district of the State, but of a court of the county in which he resides. If it be one of two, three or four, constituting a single judicial district, he is not a judge of that district, with jurisdiction extending all over it, as does that of each of the Common Pleas judges within it. His jurisdiction is limited to the county in which his court exists. This being true, he is not a judge within the strict meaning of the words, "judges of the courts for the several judicial districts" appearing in the sixth amendment of 1909; but it does violence to that amendment to hold that it was not intended thereby to include Orphans' Court judges, as well as Common Pleas judges, in the class of officers to be elected at municipal elections in odd-numbered years. Keeping in mind the manifest intention of the sixth amendment, to which we have alluded, it seems to be quite clear that the Orphans' Court judges of the State are to be elected at the same time that elections are held "for judges of the courts for the several judicial districts, and for county, city, ward,

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borough and township officers, for regular terms of service." Unless this be so, Orphans' Court judges are in the anomalous situation of having no time fixed for their election. They are made elective by the Constitution, but, as amended, it will be searched in vain to find any other provision than amendment six of 1909 under which they can be elected.

The second question for determination is, Shall Judge DALLETT'S successor be elected this year or in 1919? As already observed, Section 25 of Article V of the Constitution has never been changed. It remains just as it was originally adopted. It is a section of "The Judiciary" article, and specifically provides that any vacancy happening by death in any court of record shall be filled by appointment by the Governor, "to continue till the first Monday of January next succeeding the first general election, which shall occur three or more months after the happening of such vacancy." This means that if the vacancy happens within three months preceding the next election at which judges are elected, the appointee shall hold his office until the first Monday of January following the second election for judges held after the death which caused the vacancy. By Section 8, Article IV, of the Constitution, known as "The Executive" article, it is provided that the Governor shall fill, by appointment, vacancies in certain offices, including "a judicial office"; and a further provision is that "in any such case of vacancy, in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election." This provision was entirely consistent with Section 25 of Article V. Has that section been made inoperative by the amendment of 1909, amending Section 8 of Article IV? That section, as amended, declares that, in case of vacancy in an elective office, the person appointed by the Governor

to fill it shall be succeeded by some one chosen on the next election day appropriate to such office, unless the vacancy shall happen within two calendar months immediately preceding such election, in which case the election for said office shall be held on the second succeeding election day appropriate to such office. Judge DALLETT died within three calendar months of the election to be held for judges this year, but more than two calendar months prior thereto. He was a judge of a court of record, and specific provision is made in Section 25 of Article V of the Constitution for the filling of that vacancy by appointment by the Governor of a person who shall hold office until the first Monday of January following the next election after this year for judges other than those elected by the electors of the State at large. That year will be 1919. True, section eight provides for appointment by the Governor to fill vacancies "In a judicial office." "A judicial office," however, is a general term and includes courts of record and courts not of record. The specific provision in the judiciary article of the Constitution for filling vacancies in courts of record has, as already stated, not been changed by amendment, and even if there were an irreconcilable conflict between it and the general provision of Section 8 of Article IV, as amended, a cardinal rule of construction applicable to constitutions as well as statutes, requires that the specific provision shall prevail: 6 Amer. & Eng. Ency. of Law (2d Ed.), 927. "Where there are in an act specific provisions relating to a particular subject, they must govern in respect of that subject, as against general provisions in other parts of the statute, although the latter standing alone would be broad enough to include the subject to which the particular provisions relate. Hence, if there are two acts, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular

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one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision': Endlich on the Interpretation of Statutes, Section 216; *Felt v. Felt*, 19 Wis. 193; *State v. Goetze*, 22 Wis. 363; *Crane v. Reeder*, 22 Mich. 322. 'Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception': *Dwaris on Statutes*": *Thomas v. Hinkle*, 126 Pa. 478.

The amendment of Section 8, Article IV, of the Constitution, does not purport to be a new provision. It recites the original section, and the meaning now to be given to the words, "in a judicial office," is the same as if the section had not been amended. This is conceded by learned counsel for appellees, who also frankly admits that "It necessarily follows that when Article IV, Section 8, was amended, and the words in a judicial office remained unchanged, they cannot be given such an enlarged meaning as to render Article V, Section 25, wholly nugatory; and hence now, as before the amendment, Article V, Section 25, governs and the vacancy caused by the death of Judge DALLETT is not to be filled at the present time."

And now, October 15, 1917, the decree of the court below is reversed, the bill is reinstated, and it is ordered, adjudged and decreed that the defendants, and each of them, be perpetually enjoined and restrained from printing upon the official ballot for the election to be held November 6, 1917, any name or names whatsoever of persons nominated for the office of judge of the Orphans' Court of Philadelphia County, other than those nominated at the primary held September 19, 1917, to fill the vacancies caused by the expiration of the terms of office of the Honorable JOSEPH F. LAMORELLE and Honorable EDWARD A. ANDERSON, the costs below and on this appeal to be paid by the County of Philadelphia.

Neel's Estate.

Wills—Construction—Legacies—Charitable bequests—Identification of legatee.

A testatrix made her will in 1909, whereby she bequeathed one-fourth of the residue of her estate to the "Allegheny County Children's Aid Society, of Allegheny County, Pennsylvania." The testatrix died in March, 1915. At the time of the making of the will there was in Allegheny County an unincorporated body known as the Children's Aid Society of Allegheny County. In May, 1918, the majority of the members of such society voted to incorporate the society, and in June, 1918, such society was incorporated by the Common Pleas Court. Thereafter certain persons who had been members of the unincorporated body, not approving of the incorporation, formed an organization known as the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary. Each of such organizations claimed the legacy. *Held*, the court properly awarded the legacy to the incorporated body.

Argued Sept. 25, 1917. Appeal, No. 163, Oct. T., 1917, by Mary Aylesworth and Augusta H. Wallace, in behalf of themselves and all others interested in the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary, an unincorporated association, from decree of O. C. Jefferson Co., April T., 1916, No. 16, dismissing exceptions to report of auditor in Estate of Nancy Neel, Deceased. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, FRAZER and WALLING, JJ. Affirmed.

Exceptions to report of auditor.

The facts appear in the following excerpts from the opinion of CORBET, P. J.:

While there is considerable volume to this controversy, the controlling matters may be found within comparatively limited bounds. A number of ladies, with the philanthropic purpose of caring for abandoned, neglected and dependent children, met together in the City of Pittsburgh, and on June 22, 1885, organized them-

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selves for that purpose under the name of "Children's Aid Society of Allegheny County and Bureau of Information," a little later abbreviating the name to "Children's Aid Society of Allegheny County." Similar societies having been formed in other Western Pennsylvania counties, it was, by concerted action of the various societies in the western counties of the State, decided to form a federation, composed of delegates from each of the county societies, and to incorporate it, in order to obtain appropriations from the State for distribution to the work among the different county societies, and to serve as a means of having an interchange of cases between the counties, and, accordingly in 1889, the Children's Aid Society of Western Pennsylvania was incorporated.

Some time after this incorporation the Children's Aid Society of Allegheny County, which had been acting under the voluntary association of its members, which has been mentioned, as did others of the county societies, appended to its name "Auxiliary to the Children's Aid Society of Western Pennsylvania," and thereafter until the incorporation hereafter mentioned the Children's Aid Society of Allegheny County, thus mentioned, received a portion of the appropriations made by the State to the Children's Aid Society of Western Pennsylvania, and continued to carry on its work, availing itself of the facilities afforded by the Western Pennsylvania Society. What connection there was with the Society of Western Pennsylvania seems to have been held lightly by the county societies, each one of which appears to have been free to drop it whenever it chose to do so.

On August 30, 1909, Nancy Neel, of Brookville, Jefferson County, Pennsylvania, made her last will and testament, wherein is found, inter alia, the following so far as it is necessary to quote: "The remainder of the said one-half principal sum of my estate shall be divided as follows: One-fourth part thereof to the Allegheny County Children's Aid Society of Allegheny County, Penn-

sylvania; one-fourth part thereof to the Presbyterian Hospital of Allegheny County, Pennsylvania; one-fourth part thereof to the Passavant Hospital of Pittsburgh, Pennsylvania.....;—the bequest to the Children's Aid Society giving rise to this controversy.

The legislative bodies of the State at the session of 1913, passed an act (later vetoed by the Governor, but not until after the incorporation hereinafter mentioned) appropriating \$20,000 to the Children's Aid Society of Allegheny County, which made it necessary, if the latter was to receive the money, that it should be incorporated. Accordingly a meeting of the society was called for May 17, 1913, to consider the matter of securing a charter. While not positively testified that all the members had notice of the meeting, it is a clear inference from the established facts that a notice was sent to each member. Out of a board membership of twenty-five, thirteen attended the meeting in person and three sent proxies. The action taken, as appears by the minutes was as follows: "The president announced that the legislature had appropriated \$20,000 to the Allegheny County Society, and that to receive the money it would be necessary for us to have our own charter. After a very careful and conscientious consideration of the matter, and comments from the members present, it was moved by Mrs. Hickman, seconded by Mrs. Rankin, that we apply for a charter. All voted for it but Mrs. Wallace and Mrs. Anderson. They did not vote. Motion was declared carried." In pursuance of this action, an application for a charter, executed on its behalf by six members of the society, was made to the Court of Common Pleas of Allegheny County, and in June, 1913, the Children's Aid Society of Allegheny County was incorporated by said court. Owing to the vetoing of the bill by the Governor on July 26, 1913, there was delay in organizing under the charter, which did not take place until in 1914, when the existing officers, who had previously been elected, became, by virtue of their offices and in

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consequence of their designation as such in the charter, officers of the incorporated society. Or, in other words, without change of object or purpose, custody or books, or apparent objection or friction, the unincorporated society merged into, and continued its business and objects as the incorporated society, without any noticeable change, save that it did not thereafter maintain any connection with the Society of Western Pennsylvania, and it has ever since, in full activity, continued its work.

The auditor has found that on June 22, 1914, about a year after application had been made for a charter for the Children's Aid Society of Allegheny County, several former board members, including the two who had resigned before the organization under the charter, with others, formed a new organization of about twenty-one members, to take care of dependent children; that this society affiliated with the Children's Aid Society of Western Pennsylvania, and for a time was known as the "Children's Aid Society of Allegheny County, Auxiliary to the Children's Aid Society of Western Pennsylvania," but in October, 1914, on advice of counsel, changed this name and title to "Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary," by which name and title it is one of the contesting parties for the bequest in question. The court has further expressed its views upon this matter in what is said upon the fifth exception. This unincorporated organization is maintained, and engages in the work for which it was formed.

Nancy Neel died a resident of Brookville, Jefferson County, Pennsylvania, on March 3, 1915, and on March 9, 1915, her will was proven and admitted to probate in the register's office of that county, and recorded in Will Book No. 5, page 267.

The question to be decided is which of these organizations is entitled to the particular bequest in question,—the Children's Aid Society of Allegheny County, or, the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary, the latter claiming to be a

reorganization and continuation of the parent Children's Aid Society of Allegheny County, by such of its members as did not give their affirmative approval and consent to the incorporation of that society, and to be thereafter in continuous succession the unincorporated society which was in existence at the time Mrs. Neel made her will.

The position held by the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary, is that the incorporation of the Children's Aid Society of Allegheny County was inoperative and ineffective as to those members of the society who did not vote for or attach themselves to the chartered society, and that they remained without change the original association.

The original association was not for profit to its members, but had for its purpose, caring for and promoting the welfare of abandoned, neglected and dependent children, as well for their good as for the good of the public. So far as the court is informed the organization of the ladies interested was without articles of association or fundamental rules specifically defining the rights of the members or the powers of the association, and was, therefore, very loose in character. Such being the case, it would seem to be a necessity that the control of its affairs, and the determination of that form of organization which at any time would best tend to the furthering of its great and beneficent purpose should be peculiarly within the control of the majority of the members thus associated together. Of course, no one could be forced into corporate membership. Nevertheless, the opinion is entertained that, under the circumstances in this case, it was within the province and power of the majority of the associates, in furtherance of the general purpose and design of the organization, to incorporate as they did, especially as the transfer or transaction was no more than a change from an unincorporated situation to a corporate situation, and all of the activities were continued by that majority and have ever since been main-

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tained by the society. Under such circumstances, the very few who remained silent ought not to have it in their power to block or prevent that which the majority deem for the best interest of the society, and to best tend to promote and carry out its original and unchanged purposes, nor be permitted to prevail in their claim of being at the present time the original society.

But in any event, how can such controversy or its definite settlement be of interest in the present matter? It is quite uncontroverted that a majority of the original society, during the lifetime of Mrs. Neel, did incorporate, taking with them to the corporation the name, identity, actual working organization, minute book, and the like, of the society, without legal question of the right so to do by any silent member, and, without cessation, continued, and has ever since continued, actively and efficiently to carry out the original objects and purposes of the society. Thereafter the donor was under no obligation to investigate whether as between themselves the incorporated society should administer her bounty, or whether the nonjoining members should do so. Sufficient for her purpose that there was and continued to be a Children's Aid Society of Allegheny County, in uninterrupted existence, identically the same in every respect except for a merger into a corporate organization from an unincorporated one. So long as she lived neither claimant had a vested interest in the bequest, nor, so far as they are concerned, was there any occasion, at the time the charter was obtained, for determining as between them, in her behalf, which was the continuing society. The court should not be required to determine that controversy now, nor should the estate be vexed with it.

Furthermore, it is to be presumed that Mrs. Neel, at the time she made her will, had some knowledge at least of the devisee to which she made the bequest; that her knowledge continued until her death; that when an alteration was made in the organization she knew of it;

and that she fully designed and intended the bequest to go to that specific organization which, at her death, should and did bear the appellation she applied in writing the bequest.

Although Nancy Neel's will was made August 30, 1909, and the Children's Aid Society of Allegheny County should have first come into being thereafter on June 14, 1913, when incorporated by the Court of Common Pleas of Allegheny County, and if on her death on March 3, 1915, no adverse claimant under the bequest in question arose to dispute the right to it, would the bequest not go to the "Children's Aid Society of Allegheny County"? Could a residuary legatee contend with success that it had lapsed because the corporation was nonexistent when the will was made, although in full being at and after the death of the testatrix? She had a beneficent purpose in view, not the mere enrichment of a society, and, if, when she died, there existed the "Children's Aid Society of Allegheny County," corresponding in location and almost identically in name with the legatee named in her will, and fully qualified and in readiness to carry out her purpose, would right and justice permit her intention to be thwarted? It is manifest she had no intention whatever to have her benefaction expended all over the western part of the State. This is clear from the wording of the specific bequest in association with the other bequests grouped with it: "One-fourth part thereof to the Allegheny County Children's Aid Society of Allegheny County, Pennsylvania; one-fourth part thereof to the Presbyterian Hospital of Allegheny County, Pennsylvania; one-fourth part thereof to the Passavant Hospital of Pittsburgh, Pennsylvania"; and the remaining one-fourth part conditionally but preferentially towards a hospital "for the people of Brookville, Jefferson County, Pennsylvania." By name and location, object and purpose, standing and fitness, no other organization, at the time of the death of Mrs. Neel, was apparently or really so rightfully entitled to claim and

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receive the bequest in question as the “Children’s Aid Society of Allegheny County.”

The court dismissed the exceptions. Mary Aylesworth and Augusta H. Wallace, in behalf of themselves and all others interested in the Children’s Aid Society of Western Pennsylvania, Allegheny County Auxiliary, an unincorporated association, appealed.

Errors assigned were in dismissing the exceptions.

Leonard K. Guiler, for appellants.

S. S. Robertson, for appellee.

PER CURIAM, October 19, 1917:

The question before the auditor and learned court below was the identification of a charitable legatee, and we have not been persuaded that there was error in their finding, under all the facts developed, that the “Children’s Aid Society of Allegheny County” is the legatee intended by the testatrix.

Appeal dismissed at appellant’s costs.

W. F. Gonder and Newton Gonder *v.* The Farmers National Bank, Appellant.

Banks and banking — Bank deposits — Transactions outside of usual banking hours — Liability of bank — Evidence — Entry in bank’s books — Attorney and client — Privileged communication.

1. At the request of a depositor in a bank, who desired to transfer certain funds on deposit in the savings department of the bank to her husband, the cashier of the bank went to the home of the depositor to arrange the transfer. He prepared a receipt for \$701.20, which the depositor signed. The cashier entered credit in the pass book of the depositor’s husband for \$701.20, and on the books of the bank entered a withdrawal of \$701.20 from the account of the depositor. No money was paid to the cashier at the home of the depositor. He withdrew from the bank the amount

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of the receipt and misappropriated it. In an action by the husband of the depositor against the bank for the amount misappropriated, the lower court decided that the bank was liable. *Held*, no error.

2. In such case it was not error to refuse to permit the bank to offer in evidence its loose-leaf ledger sheet showing the omission of the item, as the bank could not relieve itself from paying money because its officers failed to make a proper entry on its books.

3. Where an item of \$1,500 was withdrawn from plaintiff's account by the cashier without any evidence that he was authorized to make such withdrawal, the jury were properly instructed to allow the plaintiff to recover the amount thereof.

4. Where another item of \$3,000 was withdrawn by the cashier from the plaintiff's account, the fact that he deposited with the papers in the bank a receipt signed by himself, for the plaintiffs did not establish the agency of the cashier for the withdrawal of the fund or justify the submission of the question of the agency of the cashier to the jury.

5. In such case the exclusion of the bank's ledger sheet showing the withdrawal of such items of \$1,500 and \$3,000 was not error, as the bank could not escape the payment of the money by showing that it had charged the plaintiff with such withdrawals in the absence of evidence of authority for such charge.

6. It was not error to refuse to permit an attorney who had had a conversation with plaintiff in the presence of the cashier after his relation with the bank had terminated, to relate such conversation where it appeared that the witness was counsel for the plaintiff and that the conversation was privileged.

Argued Sept. 25, 1917. Appeal, No. 106, Oct. T., 1917, by defendant, from judgment of C. P. Somerset Co., Sept. T., 1913, No. 361, on verdict for plaintiff in case of W. F. Gonder and Newton Gonder, Executors of the last Will and Testament of Frederick Gonder, Deceased, v. The Farmers National Bank, of Somerset, Pennsylvania, Appellant. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Assumpsit for money deposited in defendant's bank.

The facts appear in the following opinion of RUPPEL, P. J., sur defendant's motion for a new trial:

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On the trial of this case plaintiffs claimed a balance due on deposits in defendant bank amounting to \$5,201.20 with some interest, and the whole controversy revolved around three items: First, plaintiffs claimed credit for \$701.20 deposited July 8, 1912, as shown by the pass book furnished by the bank. The defendant denied that it received this sum or that it was liable therefor in this action. Second, the defendant claimed a credit for withdrawal by Frederick Gonder of \$1,500 on the 24th of July, 1912, and plaintiffs denied having withdrawn said sum. Third, defendant claimed credit for \$3,000 withdrawn January 10, 1913, which withdrawal plaintiffs also denied. There were no disputed facts as to the first item. Frederick Gonder, who lived in Jenner Township, about twelve miles from Somerset, was a depositor in the defendant bank, beginning in 1902. His nephew, Henry F. Barron, was cashier of the bank. Mrs. Mary Gonder, wife of Frederick Gonder, was also a depositor in the defendant bank. Both these deposits were in the department known as the savings department of the bank, and the interest at three per cent. was computed semiannually and credited to the accounts. On the 6th of July, 1912, in response to a request on part of Frederick Gonder, Henry F. Barron, the cashier, went to the home of Mr. Gonder in Jenner Township and was there informed that Mrs. Gonder desired to transfer her account in the bank to her husband, Frederick Gonder. Mr. Barron prepared a receipt for \$701.20, which Mrs. Gonder signed. This receipt is dated July 6, 1912, but at the bottom, after the signature of Mrs. Gonder and the attesting witness, is this note: "Farmers National Bank, Somerset, Pa. Paid July 8, 1912." At the time this receipt was given Mr. Barron entered a credit in the pass book of Frederick Gonder for the same amount, \$701.20, but dated it as of July 8, 1912. The transaction took place on Saturday evening after banking hours and therefore the papers were dated so as to show the transaction as of July 8th, the first banking

day after the time of the transaction. The books of the bank show the entry of the withdrawal of \$701.20 from the account of Mary Gonder, but do not show the credit for the same amount in the account of Frederick Gonder. The bank defends against this item on the ground that the transaction did not take place in the bank, but at the home of the depositor, twelve miles distant, and that therefore the depositor made Mr. Barron his agent and the bank is not responsible for any misappropriation of the money by Mr. Barron. While the authorities are not uniform on this question of the business transactions outside of the bank, we are inclined to think that the better rule is to hold the depositor liable for the agency of the officer of the bank for acts done outside of usual banking hours and away from the place of banking. Particularly in view of the act of congress under which the defendant is chartered. Section 5190 of the United States Revised Statutes provides that "the usual business of each national banking association shall be transacted at an office of banking house located in the place specified in its organization certificate"; and if Mr. Gonder had given \$701.20 in cash to Mr. Barron, requesting him to deposit it to his account, under the circumstances we would hold the bank not liable. But there are two answers to the bank's contention in this case: First, no money was paid at the home of Mr. Gonder; there was simply a transference of two accounts. Mrs. Gonder gave Mr. Barron a receipt for the amount of money shown by the bank's book to be due her. This receipt was used as the basis of a deposit to the credit of Frederick Gonder. The bank's books show the withdrawal of the \$701.20 from the account of Mary Gonder and the receipt given by Mary Gonder is on file with the papers in the bank, but Mr. Barron failed to give credit on the account of Frederick Gonder for the same money; therefore, either the bank has this \$701.20 or that amount was abstracted by Mr. Barron. If the money was abstracted by Mr. Barron it was not done at the

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home of Mr. Gonder, but must have been done in the office of the bank and must have been done on or after July 8, 1912. Having accepted the benefits of the transaction by Mr. Barron as to the Mary Gonder account, the bank cannot repudiate what he did as to the account of Frederick Gonder, and therefore the bank is liable for the item.

Second. As stated above, if the money was abstracted it was abstracted from the bank and not at the home of Mr. Gonder.

Defendant complains of the court's rulings in excluding its offer to put in evidence the loose-leaf ledger sheet of the bank showing the omission of this item of \$701.20. The bank cannot relieve itself from paying this money because its officers failed to make a proper entry in its books. Under the undisputed facts in this case the bank was liable for this amount and the introduction of the bank's account showing the omission could not affect the result, and therefore the jury were instructed to allow plaintiff to recover this item in their verdict.

The second item of dispute is as to the alleged withdrawal of \$1,500 on the 24th of July, 1912. The defendant undertook to establish the fact that Henry F. Barron was the agent of the plaintiffs and that the withdrawals for which credit is claimed were made by said Barron as the agent of the plaintiffs. No attempt was made to prove such agency on part of Barron for the testator, Frederick Gonder, and this item of \$1,500 is marked withdrawn on the books of the bank during the lifetime of Frederick Gonder, who died on the first of August, 1912, and there having been no evidence whatever of any withdrawal of this fund from the bank by proper authorization, the jury were instructed to allow the plaintiffs to recover said sum in this action.

The third disputed item is an alleged withdrawal by the plaintiffs of \$3,000 on the 10th of January, 1913. This money was taken from the bank by Mr. Barron and at the same time he deposited with the papers in the

bank a receipt for the said sum of \$3,000 signed "Fred Gonder's executors, per H. F. Barron, cashier." The bank claims that at the time this receipt was filed Mr. Barron was acting as an agent for the plaintiff and that they are not chargeable with any misappropriation of this money. The question of agency was submitted to the jury and they found against the bank. Upon a careful reading of the testimony we are convinced that the jury could not have found otherwise. There is not a particle of evidence in the case to justify the jury in finding that Barron had been employed as the agent of the plaintiffs. In fact, this question should not have been submitted to the jury, but as it was submitted and the finding being adverse to the defendant, it has no grounds for complaint.

The defendant complains of the court's ruling in excluding the bank's ledger sheet showing the withdrawal of these two items of \$1,500 and \$3,000, but the bank cannot escape the payment of this money by showing that it has charged the plaintiffs with these sums in the absence of any further authority for such charge. The pass book given to the plaintiffs makes no reference to these two items of withdrawal. This book is in the handwriting of Mr. Barron and it was submitted periodically to the officers of the bank for balancing and no objection was at any time taken to the account as shown on the plaintiff's book. The fact that the last four items on this book show changes or alterations was explained by the plaintiffs. The book was handed to Mr. Barron at his request while he was acting as cashier of the bank and some time later, after repeated demands, he handed it back to the plaintiffs with the changes made; but the changes or alterations apparent on the face of the book do not in any way affect the rights of the parties as to the disputed items. There is no allegation or even intimation that either the \$1,500 or the \$3,000 was entered at any time in plaintiffs' pass book. The only changes

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in the book are on balances due and these seem to relate to charges of interest.

Another complaint made by the defendant is the rejection of J. A. Berkey, Esq., as a witness. Mr. Berkey, when on the stand, was asked as to a conversation he had with the plaintiffs in the presence of Henry F. Barron after Mr. Barron had been relieved as cashier of the bank, and the objection was made on the ground that the conversation was privileged. Mr. Berkey was a member of the firm of Berkey & Shaver and this firm was the counsel for the plaintiffs as executors in the settlement of the Gonder estate, and upon that ground the testimony was excluded.

"It is not merely the privilege of the attorney, but the rights of the party, that forbid the disclosure of such communications, and therefore the attorney is not permitted to divulge them, though willing to do so": *Miller v. Weeks*, 22 Pa. 89, 92.

"The party who offers this evidence is not the other party to the contract, but a stranger who had no connection with it. To us it is perfectly clear that any words spoken, or any acts done, by the client, in such circumstances, in the presence of his attorney and in the course of his employment are privileged, and may not be proved by the testimony of the attorney without the consent of the client": *Kaut & Reineman v. Kessler & Schlather*, 114 Pa. 603, 610.

"And I think the true principle in reference to privileged communications between attorney and client to be, that where the attorney is professionally employed, any communication made to him by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication": *Bank of Utica v. Mersereau*, 3 Barb. Chancery (N. Y.) 528, 595; *Tyler v. Hall*, 106 Mo. 313.

This last case rules that a third party present at such a conversation can be called upon to testify although the attorney cannot.

In *Commonwealth v. Griffin*, 110 Mass. 181, it was held that a third party could be called to testify as to a conversation between husband and wife, even where the husband was under indictment for manslaughter.

To the same effect in *Gannon v. People*, 21 N. E. Repr. 525.

"The fact that confidential communications by a client to an attorney were made in the presence of a third person, does not qualify the attorney as a witness in regard to such communications": *Blount v. Krimpton*, 29 N. E. Repr. 590; see *Caleb Whiting v. David Barney*, 30 N. Y. 330; *Alexander v. Queen*, 253 Pa. 195.

Furthermore, an objection to the testimony could have been sustained on the ground of irrelevancy; and the same applies to the testimony of the witnesses A. P. Smith, H. L. Sipe, Freeman J. Hoffman and Isaiah Good. An effort was made to establish by these witnesses that the plaintiffs, after the defalcation of Barron had become known, made an endeavor to settle with Barron and to take his paper with satisfactory security for the amount of their claim. It was by this evidence that the defendant undertook to establish the alleged agency of Barron. Taking all this testimony in connection with the excluded offer of J. A. Berkey, in its strongest light in favor of the defendant, it does not tend to establish an agency; although the court submitted this question to the jury, we are satisfied, upon a careful review of the testimony, that there was nothing in the evidence which justified such submission to the jury, and if the jury had found in favor of the defendant upon this issue, the court necessarily would have had to set aside the verdict. Even had the plaintiffs made an honest endeavor to secure this claim by taking Mr. Barron's paper with other security, or had they even gone so far as to have accepted the paper, that fact would not have shown any agency. The plaintiffs were relatives of Mr. Barron; they perhaps were quite willing to shield him as far as possible, and there would have been no inconsistency in their

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making a settlement with Mr. Barron of their claim had the bank owed the money. And so with regard to remarks that were made as to their being "satisfied" that Barron had taken the money from the bank. Evidently if these words were used as attributed to them by some of the witnesses, the meaning was that the plaintiffs were convinced or persuaded by the statements of Mr. Shaver and others that Barron had misappropriated the money. There is nothing in any of these statements, viewed in the strongest light possible, favorable to the defendant, that tends to relieve the bank from responsibility.

The case of *Greenhalgh Co. v. Farmers' National Bank*, 226 Pa. 184, contains many features common to the case at bar; and upon careful consideration of all the evidence in the case we are satisfied that no other verdict could be rendered than the one returned by the jury.

Verdict for plaintiff for \$6,132.25 and judgment thereon. Defendant appealed.

Errors assigned were rulings on evidence and instructions to the jury.

Norman T. Boose, for appellant.

Francis J. Kooser, with him *Ernest O. Kooser*, for appellees.

PER CURIAM, October 19, 1917:

The facts in this case appear in the opinion of the learned court below dismissing the motion for a new trial, and, for the reasons therein stated why the plaintiffs are entitled to recover, the judgment on the verdict in their favor is affirmed.

Young's Estate.

Real estate—Minerals—Owner of land only—Partition.

One who has parted with all his right, title and interest in a vein of coal underlying land in which he still has an interest has no standing to maintain a partition proceeding instituted for the partition of the entire tract including the coal.

Argued Oct. 1, 1917. Appeal, No. 70, Oct. T., 1917, by Aaron O. Young, from decree of O. C. Greene Co., Dec. Court, 1914, No. 4, refusing partition, in Estate of John Young, Deceased. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Petition for partition of the real estate of decedent. Before IRWIN, J.

The opinion of the Supreme Court states the facts.

The court refused the petition. Aaron O. Young appealed.

Error assigned was the decree of the court.

Andrew A. Purman, for appellant.

W. J. Kyle, with him *J. B. Adams* and *R. F. Hopwood*, for appellees.

PER CURIAM, October 19, 1917:

As Aaron O. Young had parted with all his right, title and interest in and to the Pittsburgh River vein of coal and mining rights, he had no standing to maintain the partition proceeding instituted for the partition of the entire tract, including surface and coal. Of the Act of May 6, 1915, P. L. 269, it need only be said that it was passed after the institution of that proceeding.

Appeal dismissed at appellant's costs.

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Cross et al., Appellants, v. Dye.

Wills and devises—Real estate—Estates tail—Act of April 27, 1855, P. L. 368—Construction—Intention.

A testatrix having given her husband an interest for life in certain real estate, gave the remainder to "my daughter, Marietta R. Cross, and my son, Walter L. Cross, and the survivors of them and their heirs in fee, but should they both die without lawful issue, then the same shall go to my sons, Jesse and Wilbur, and their heirs." Walter L. Cross died unmarried and without issue prior to testatrix, but Marietta R. Cross survived the testatrix and the life tenant and aliened the property. In an action by Jesse and Wilbur against the grantee of Marietta R. Cross, brought after the death of Marietta, the court held that Marietta had received an estate tail which became a fee simple estate under the Act of April 27, 1855, P. L. 368, and directed a verdict for defendant. *Held*, no error.

Argued Oct. 1, 1917. Appeal, No. 159, Oct. T., 1917, by plaintiffs, from judgment of C. P. Greene Co., Dec. T., 1915, No. 83, on verdict for defendant, in case of Jesse R. Cross and Wilbur F. Cross v. A. J. Dye. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Ejectment for lands in Greene County. Before RAY, P. J.

From the record it appeared that the third and fourth paragraphs of the will of Harriet R. Cross were as follows:

"If my husband, A. G. Cross, should survive me, it is my will that he shall have the house and lot I now own on Washington Street, in Waynesburg Borough, Pa., during his life and the rents, issues and profits thereof, free from any debts he may now owe or hereafter contract, he to pay taxes thereon and keep the same in good and sufficient repair, and at his death I give and devise the said house and lot to my daughter, Marietta R. Cross

Statement of Facts—Opinion of the Court. [253 Pa. and my son Walter L. Cross and the survivor of them and their heirs in fee, but should they both die without lawful issue then the same shall go to my sons, Jesse and Wilbur and their heirs.

“It is my will that if my daughter, Marietta R. Cross should marry that the estate I have above devised to her in the said house and lot shall be subject to her separate use and control and shall not become liable in any manner for the debts of her husband, being unwilling that my bounty to her shall be dissipated or aliened by strangers or other debtors than her own.”

Walter L. Cross died November 4, 1893, unmarried and without issue. The decedent died November 28, 1894. Marietta R. Cross survived her brother, Walter L. Cross, and her father, A. G. Cross, and conveyed away the premises, which by various mesne conveyances became vested in the defendant. Upon the death of Marietta R. Cross, plaintiffs brought the action contending that under the will of Harriet R. Cross, there was but a life estate in Marietta R. Cross, with remainder over to them.

Verdict for defendant by direction of the court and judgment thereon. Plaintiffs appealed.

Errors assigned were in directing a verdict for defendant and in entering judgment thereon.

J. I. Hook and *A. H. Sayers*, for appellants.

T. S. Crago, of *Crago & Montgomery*, for appellee.

PER CURIAM, October 19, 1917:

This judgment is affirmed on the following from the charge of the court in directing a verdict for the defendant: “In the opinion of the court the will in question created in Marietta R. Cross, daughter of Harriet R. Cross, the testatrix, an estate tail which estate, under the Act of Assembly in this State passed in 1855,

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became a fee simple estate in Marietta R. Cross, and as we view it by her deeds there finally became vested in A. J. Dye, the defendant in this case, a fee simple to the property in question."

Judgment affirmed.

**Commonwealth ex rel. Graham v. Cameron,
Appellant.**

Public officers—Justices of the peace—Jurisdiction—Place of residence—Act of February 22, 1802, 3 Smith's Laws 490.

1. Under the Act of February 22, 1802, 3 Smith's Laws 490, providing that no justice of the peace shall act as such, unless he shall reside within the limits of the district for which he was commissioned, a justice of the peace residing in that part of a township, which, after the justice was commissioned for the entire township, was annexed to a borough, ceases to have any legal right to exercise the office of justice of the peace.

Justices of the peace—County officers—Jurisdiction, C. P.—Quo warranto—District attorney.

2. Although a justice of the peace receives a commission from the governor, he is not a State, but a county officer; and his right to hold office may, therefore, be questioned in quo warranto proceedings by the district attorney of the county in which he claims the right to hold office.

Argued Oct. 2, 1917. Appeal, No. 60, Oct. T., 1917, by respondent, from judgment of C. P. Beaver Co., Dec. T., 1916, No. 60, of ouster, in case of Commonwealth of Pennsylvania ex rel. Louis E. Graham, District Attorney, v. Walter S. Cameron. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Quo warranto to test defendant's right to exercise the office of justice of the peace in the Township of Harmony.

The facts appear in the following opinion of BALDWIN, P. J.:

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The suggestion and demurrer in this case raise two questions:

(1) Whether a justice of the peace who ceases to reside within the district for which he has been commissioned thereby loses his office.

(2) Whether the district attorney may file a suggestion for a writ of quo warranto against a justice of the peace.

A third question is raised by counsel for respondent, namely, whether or not if the respondent is attempting to transact official business outside of the district for which he was elected the remedy is by injunction and not by quo warranto. Counsel for respondent, in support of their contention that the remedy is by injunction, cite the case of Commonwealth ex rel. v. Smail, 238 Pa. 106. In that case, however, there was no question as to the right of Smail to act within the territory for which he was elected. It was not contended that he had changed his residence. In that case the questions decisive of the case at bar were not before the court.

Taking up the above mentioned questions in their order:

As to the first question:

The respondent was duly elected and commissioned as a justice of the peace for the Township of Harmony. In March, 1916, by proceedings duly and legally had, a part of said Township of Harmony was duly annexed to the Borough of Ambridge, the residence and office of said respondent being in that portion of Harmony Township so annexed. By virtue of said annexation proceedings, the respondent became a resident of the Borough of Ambridge. The respondent, nevertheless, continues to exercise his office of justice of the peace in and for said township.

The Act of February 22, 1802, 3 Smith's Laws 490, provides: "That from and after the first day of August, next, no justice of the peace shall act as such unless he shall reside within the limits of the district for which

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he was commissioned." The Act of June 21, 1839, P. L. 376, 380, Section 13, provides as follows: "The several aldermen and justices of the peace elected and commissioned under this act shall be subject to removal in the same manner and for the same causes prescribed by the existing laws of this Commonwealth, and during their continuance in office shall respectively keep their offices in the ward, borough or township for which they shall have been elected."

It will be noted that the Act of 1802 provides that "no justice of the peace shall act as such unless he shall reside within the limits of the district for which he was commissioned." The respondent's commission made him a justice of the peace for the Township of Harmony. If the whole of the district had been annexed to the Borough of Ambridge, it is clear that his commission could not continue to exist: Commonwealth ex rel. v. Hudson, 253 Pa. 1.

But it is only the part of Harmony Township in which the respondent resides and keeps his office that has been annexed to the Borough of Ambridge. If there had been no annexation proceedings and the respondent had moved into the Borough of Ambridge, there is no question but that he could not exercise his commission. That would be true if the respondent thus changed his residence by his voluntary act. The result is precisely the same where the residence has been changed involuntarily. The annexation proceedings legally removed him from the Township of Harmony. Hence the respondent is without legal right to exercise the office of justice of the peace.

As to the second question :

Is the district attorney the proper party to file the suggestion, or must it be filed by the attorney general?

The Act of 1836, P. L. 621, Section 2, provides :

"Writs of quo warranto, in the form and manner hereinafter provided, may also be issued by the several Courts of Common Pleas, concurrently with the Supreme

Court, in the following cases, to wit: 1. In case any person shall usurp, intrude into or unlawfully hold or exercise any county or township office within the respective county.....and in any such case the writ aforesaid may be issued upon the suggestion of the attorney general, or his deputy, in the respective county, or of any person or persons desiring to prosecute the same."

If the office of justice of the peace is a county office within the meaning of the Act of 1836, then it would seem that the district attorney, who occupies the position formerly held by the deputy attorney general (Act of May 3, 1850, P. L. 654), has the authority to file the suggestion. There are some county court cases to the contrary. In 1870 Judge STOWE of the Allegheny County courts held in *Commonwealth v. Reed*, 18 P. L. J. 131, that the district attorney had no right to file a suggestion for a writ of quo warranto against an alderman. The ground of that decision was that an alderman held a commission from the governor. In *Commonwealth ex rel. Stewart v. Reilly*, 14 Pa. D. R. 531, the *Reed* case was followed, the court holding that the district attorney could not file a suggestion for a writ of quo warranto against a public officer commissioned by the governor.

The Act of 1836 authorizes the district attorney to file a suggestion for such writ against any person unlawfully holding or exercising "any county or township office within the respective county." If the office of justice of the peace is a county office, then the district attorney has authority to file the suggestion. *Commonwealth v. Callen*, 101 Pa. 375, is authority for the proposition that the office of justice of the peace is a county office, within the meaning of the Act of 1836. It is certainly not a State office; and the fact that the commission is from the governor of the State does not make it such. In *Commonwealth v. Callen*, *supra*, the Supreme Court in a *per curiam* affirmed the lower court upon its opinion, which held: "An alderman or justice of the peace is not properly a ward, borough or township of-

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ficer, nor is the office a judicial office, strictly speaking, although the constitutional provisions on the subject are found in the article on the judiciary. We must, however, consider it as belonging to the class of ward, borough or township offices, because it is placed in that class by the constitution. And it is the only office of that class where, under existing laws, the governor has power to appoint, in case of vacancy."

There are a number of other cases holding that a justice of the peace is a county office: Commonwealth ex rel. v. Brunner, 6 Pa. C. C. 323; Stapleton v. Griest, 26 Pa. C. C. 134; Commonwealth ex rel. v. Lentz, 13 Pa. D. R. 388.

If the justice of the peace is not either a county or township officer within the purview of the Act of 1836 he must be a State officer, and the Supreme Court only has original jurisdiction under the Constitution to try the title to same.

The Courts of Common Pleas of the State have for years exercised jurisdiction in disputes of this kind; and no one seems to have questioned or disputed the propriety thereof; everyone has assumed that a justice of the peace is a county as distinguished from the State officer, and that a disputed title to same should, therefore, be tried in the Court of Common Pleas.

There being no appellate court decision deciding this question, we have reached the conclusion that the district attorney is the proper person to file a suggestion for a writ of quo warranto against a justice of the peace.

The defendant demurred to the suggestion for the writ. The court overruled the demurrer and entered judgment of ouster against the respondent. Respondent appealed.

Error assigned was the judgment of the court.

Richard S. Holt, with him Clyde Holt and Harry B. Richardson, of Holt, Holt & Richardson, for appellant.

William A. McConnel, for appellee.

PER CURIAM, October 19, 1917:

The judgment in this case is affirmed on the opinion of the learned court below overruling defendant's demurrer and directing judgment of ouster to be entered against him.

Naugle et al. v. Irvin, Appellant.

Wills—Construction—Devises—Gift in fee—Defeasible gift—Intention.

Testator devised his residuary estate, including certain realty, to "my two children (naming them) their heirs and assigns, share and share alike, or each to have one-half. . . . In case of the death of either child during minority, without issue, then the share of such child dying without issue shall go to and be vested in such surviving child." The will then provided for a gift over to certain named devisees in case of the death of both children without issue. *Held*, that each of the testator's two children took a fee simple estate in one-half of said real estate, defeasible only by death without issue during minority and indefeasible on arrival at the age of twenty-one.

Submitted Oct. 2, 1917. Appeal, No. 168, Oct. T., 1917, by defendant, from judgment of C. P. Beaver County, Dec. T., 1916, No. 243, for want of a sufficient affidavit of defense in case of J. F. Naugle and Essie N. Stone v. R. O. Irvin. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Assumpsit to recover purchase-price of real estate. Before BALDWIN, P. J.

From the record it appeared that plaintiffs claimed \$1,950, being the balance due them on a written contract for the sale of real estate under which defendants had agreed to purchase from plaintiffs certain land located in the Borough of Beaver Falls.

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Plaintiffs had tendered a general warranty deed conveying the property in fee and defendant had refused to pay the balance of the purchase-money.

Defendant's affidavit of defense alleged that the title of plaintiffs to said land was under the will of David S. Naugle, deceased, and that under said will the plaintiffs did not have a fee simple title.

Plaintiffs claimed title under the eighth paragraph of said will which was as follows:

"Eighth. All the rest, residue and remainder of all my personal, real and mixed property or estate (including the remainder in the Second street property) I will, give, devise and bequeath unto my two children, Essie B. Naugle and John Franklin Naugle, their heirs and assigns, share and share alike, or each to have one-half. This devise and bequest to include all property of whatever kind and wherever situated.

"In case of the death of either child during minority, without issue, then the share of such child dying without issue, shall go to and be vested in such surviving child.

"In case of the death of both of said children, without issue, then the property and estate willed, devised and bequeathed to them I will, devise, give and bequeath unto my wife, Mary P. Naugle, the same during the life or so long as she remains my widow. On her death or remarriage, I will, devise and bequeath one-fifth of the same to the surviving children or their issue of my deceased sister, Sarah E. Brittain, the remaining four-fifths I will, devise and bequeath to my mother, Emiline Naugle, and my brother, John F. Naugle, if living, or to the survivor thereof, or in event of death of both to the issue of my said brother, if any, or if both have deceased without issue, then the said four-fifths to go to and vest in the surviving children, or their issue, of my deceased sister, Sarah E. Brittain."

Plaintiffs had both reached the age of twenty-one years.

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The lower court entered judgment for the plaintiffs for want of a sufficient affidavit of defense. Defendant appealed.

Error assigned was in entering judgment for the plaintiffs for want of a sufficient affidavit of defense.

Roger Cope, for appellant.

Joseph Knox Stone, for appellees.

PER CURIAM, October 19, 1917:

Each of the appellees is of age, and the judgment from which the appellant appealed is affirmed on the following from the opinion of the court directing it to be entered for want of a sufficient affidavit of defense: "Our study of this will leads us to the conclusion that under the same each of the testator's two children took a fee simple estate in the one-half of said real estate, defeasible only by death without issue during minority, and indefeasible on arrival at the age of twenty-one."

Judgment affirmed.

McKeown's Estate.

Wills—Construction—Rule against perpetuities—Accumulations—Act of April 18, 1853, P. L. 503—Intention.

Testatrix devised three-fourths of her residuary estate in trust, directing that the income be given to her three sons for life, and providing that upon the death of any of such sons the one-third part theretofore paid to such deceased son should be equally divided among his children and that the principal of such third should be divided among such children upon their arriving at the age of twenty-five years. The will then provided, "upon any of my sons dying without children or the issue thereof living, then I direct my said trustee to pay such interest as they would have received hereunder, to the children of my other sons per capita, upon their arriving at the age of twenty-five years." The eldest son of the

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testatrix died after the testatrix without issue, and a daughter of the testatrix claimed that the gift over to the children of surviving sons of the testatrix was void as an accumulation and was violative of the rule against perpetuities. *Held*, (1) the testatrix intended that the one-third of the trust estate, the income of which was paid to the deceased son of the testatrix during his life, should on the death of such son vest in the children of her surviving sons as a class immediately upon the death of such deceased son, and (2) that the will did not violate the rule against perpetuities or the statute against accumulations.

Argued Oct. 3, 1917. Appeal, No. 97, Oct. T., 1917, by Anna L. Braden, from decree of O. C. Washington Co., May T., 1916, No. 46, dismissing exceptions to adjudication in Estate of Sara McKeown, deceased. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Exceptions to adjudication. Before McILVAINE, P. J.

From the record it appeared that testatrix devised the residue of her estate, real, personal and mixed, in trust, one-fourth to the use of her daughter, and provided as follows as to the remaining three-fourths:

"And I do direct my said trustee to pay annually one-third of the net income from the said remaining three-fourths to each of my sons, William King McKeown, James B. McKeown and Scott A. McKeown, during their natural lives, but upon the death of any one of them, he shall pay the third part theretofore paid to such deceased son, to his widow and children, in the proportion of one-third thereof to the widow and two-thirds thereof to the children until they arrive at the age of twenty-five years, the payment to such widow, however, to cease upon her subsequent marriage or death, and in no event whatever is any income to be paid to the widow of my son, Arthur J. McKeown, it being my will and I do so direct that she receive nothing under this will. Upon the children of any deceased son arriving at the age of twenty-five years, I direct my said trustee to pay to such children in equal shares, the one-third of the remaining

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three-fourths of such trust estate, excepting, however, that if the widow of my said son be then still living and unmarried, one-third of said one-third shall be withheld by my said trustee and the income therefrom be paid annually to such widow (except the widow of my son Arthur J. McKeown, who shall receive nothing hereunder), until her death or marriage, when the principal so withheld shall be paid to such children or the issue thereof. Upon any of my sons dying without children or the issue thereof living, then I direct my said trustee to pay such interest as they would have received hereunder, to the children of my other sons per capita, upon their arriving at the age of twenty-five years."

Testatrix died on July 5, 1910. William King McKeown died May 7, 1914, without children or the issue thereof, leaving surviving him Mary McKeown, his widow. Testatrix's daughter thereafter petitioned the Orphans' Court for a citation to compel the trustee under the will to file an accounting and for a distribution, contending that the gift over to the children of the surviving sons of the testatrix was in violation of the rule against perpetuities and the statute against accumulations.

The auditing judge filed the following conclusions of law:

"1st. That the testator intended that the one-third of the trust estate, the income of which was paid to William King McKeown during his life, should vest in the children of her surviving sons, James B. McKeown and Scott A. McKeown, as a class, immediately upon the death of the said William King McKeown, and that two-thirds of the income previously paid to him should be paid to them until they were twenty-five years of age, and one-third thereof to his widow, the payment to such widow, however, to cease at her subsequent marriage or death; and upon the said children of the said James B. McKeown and Scott A. McKeown arriving at the age of twenty-five years, the principal from which this income

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accumulated to be paid to such children in equal shares, excepting, however, that if the widow of said William McKeown be then still living and unmarried, one-third of said one-third to be held by the trustee and the income therefrom paid annually to her until her death or marriage, the principal so withheld to be paid to such children or issue, or the issue thereof.

"2nd. That neither the rule against perpetuities nor the Statute of 1853, against accumulation was violated by the testatrix when she disposed of the rest, residue and remainder of her estate, real, personal and mixed, as set out in full in the tenth paragraph of her will quoted in the facts alleged and admitted."

The lower court dismissed the petition. Petitioner appealed.

Error assigned, among others, was the decree of the court dismissing the petition.

John C. Bane, with him *James P. Bruden*, *A. G. Braden* and *Charles W. Campbell*, for appellant.

Norman E. Clark, with him *Isaac M. Baum* and *Winfield McIlvaine*, for appellee.

PER CURIAM, October 19, 1917:

This appeal is dismissed and the decree of the court below affirmed on the legal conclusions reached by its learned president judge in his opinion dismissing the petition of the appellant for a citation.

Appeal dismissed at appellant's costs.

Hamilton v. People's National Bank, Appellant.

Trusts and trustees—Guardian and ward—Embezzlement—Sale of bonds registered in ward's name—Failure of purchaser to make inquiry—Liability of purchaser to ward—Equity—Decree—Return of bonds—Accounting.

Where a guardian sold to a bank certain corporate bonds registered in the name of his ward, such bonds providing that after registration no transfer thereof would be valid unless made on the books of the company, it was the duty of the officer of the bank with whom the guardian dealt to make inquiry as to the authority of the guardian to make the sale, although such officer did not know that he was dealing with a guardian, and where no such inquiry was made the bank was not in the position of a purchaser without notice, and a decree in equity to compel a surrender of such bonds to the ward and for an accounting, was proper.

Argued Oct. 3, 1917. Appeal, No. 123, Oct. T., 1917, by defendant, from decree of C. P. Washington Co., No. 2437, in Equity, directing surrender of bonds in case of Harry D. Hamilton, Guardian of the Estate of Clark N. Hathaway, a minor, v. Peoples National Bank of Washington. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Bill in equity to compel surrender of bonds and for an accounting. Before IRWIN, J.

From the record it appeared that Harry Russell Myers, Esq., a member of the Washington County bar, was appointed guardian of Clark W. Hathaway on February 26, 1906. Thereafter he purchased with his ward's funds three coupon bonds, containing a provision that title should pass by delivery unless registered on the books of the company, but that after registration no transfer except on the books of the company should be valid unless the last registration shall have been made to bearer. The bonds were duly registered in the name of

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the ward, and such registration was evidenced by endorsement on the back of each bond.

On August 20, 1913, Myers obtained a loan from the defendant bank for his personal use and secured the same by the deposit of the bonds. At the time the loan was made and the bonds pledged as collateral security neither the bank nor its cashier with whom the guardian dealt, knew that Myers was guardian of Clark N. Hathaway, nor was any inquiry made of Myers as to how he came in possession of the bonds or by what authority he was pledging them as collateral security for his own indebtedness. A few days prior to August 14, 1915, Myers lifted the three bonds in question and substituted other securities.

On August 14, 1915, the said H. R. Myers was desirous of purchasing a certain mortgage on some coal property held by James A. Mounts, who was a depositor in the defendant bank, and he also desired to pay a note of Isaac W. Semans of \$3,500, which the defendant bank held, and also his own note of \$2,500. To accomplish this, on the forenoon of Saturday, August 14, 1915, he obtained a loan from the defendant bank of \$8,900 and deposited as collateral security therefor ten bonds of the Pittsburgh-Westmoreland Coal Company. At the same time he sold to the defendant bank the three bonds of the Citizens' Water Company of \$1,000 each, which he had pledged to the said bank as collateral for the said loan of \$2,500, dated January 1, 1915. This \$3,000 added to the \$8,900 loan made \$11,900. The said H. R. Myers then gave to the defendant bank his personal check on another bank for \$251.50, bringing the total amount, including the loan of \$8,900, the \$3,000 for the bonds, and his personal check, to \$12,151.50.

H. R. Myers had no checking account in the defendant bank and was not given credit on the books of the bank for the said sum of \$12,151.50, but that amount was applied as follows: first, to the payment of his own note of \$2,500; second, to the payment of the Isaac W. Se-

mans note of \$3,500, then to the payment of the accrued interest on those two notes, amounting to \$129.50, making a total of \$6,129.50, leaving a balance of \$6,022.

Subsequently on the afternoon of August 14th or the morning of August 16th, Myers instructed the cashier of the bank to place the \$6,022 to the credit of James A. Mounts, and that was accordingly done.

During these negotiations the cashier of the bank knew that the proceeds of the bonds which Myers sold to the defendant bank were to go into a common fund with the proceeds of his loan of \$8,900, and that the balance, after the payment of the Semans and Myers notes was to be applied to the purchase of a mortgage from Mounts. No inquiry was made by the cashier as to what authority Myers had for selling the bonds, nor was any inquiry made of him as to whom the mortgage was to be assigned which Myers was purchasing from Mounts.

The lower court filed the following conclusions of law:

2. These bonds being registered, and the bonds providing specifically that after registration no transfer thereof would be valid except on the books of the company, it was the duty of the cashier of the defendant bank to make inquiry as to the authority of the said H. R. Myers to make sale of said bonds.

3. The defendant bank is affected not only with notice of all such relevant facts as its cashier had knowledge of at the time of the purchase of these bonds, but of all relevant facts of which he would have obtained knowledge had he made proper inquiries as to the authority which Myers had to make sale of the bonds.

4. The said defendant bank is not an innocent purchaser, without notice, of said bonds, and is not entitled to retain possession of the same.

5. The plaintiff is entitled to a decree requiring the said defendant bank to turn over said two bonds Nos. 504 and 506, with their accompanying interest coupons, to the said plaintiff, and also to an accounting to the said plaintiff of all moneys which the said defendant bank

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has collected on the interest coupons which were attached to said bond.

6. The defendant should pay the costs of this proceeding.

The lower court entered a decree in accordance with its conclusions of law. Defendant appealed.

Error assigned was in dismissing exceptions to findings of fact and conclusions of law, and the decree of the court.

Rufus S. Marriner, of Wiley & Marriner, with him James P. Eagleson, for appellant.

H. B. Hughes, with him Harry D. Hamilton and B. G. Hughes, of Hughes & Hughes, for appellee.

PER CURIAM, October 19, 1917:

This appeal is dismissed and the decree affirmed, at appellant's costs, on the second, third, fourth, fifth and sixth legal conclusions of the learned chancellor below.

Commonwealth v. Dennery, Appellant.

Criminal law—Murder—First degree—Robbery—Motive—Ill will—Identification of defendant—Voice—Evidence—Res gestæ—Charge—Sufficiency—Avoiding arrest—Rebutting inference—Conviction of accomplices—Admissibility—Jurors of same name—Error in summoning—Waiver—Act of March 31, 1860, Sec. 53, P. L. 487.

1. In the trial of an indictment for murder it appeared that the defendant and two confederates, all armed with revolvers and with their faces partly concealed with handkerchiefs, went to a shanty where deceased was visiting. The defendant entered, placed his revolver against deceased's head and shot and killed him instantly. Defendant and his confederates compelled the other occupants of the shanty to hold up their hands and took from the only one possessing any money all that he had. Defendant was positively

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identified by one of the occupants of the shanty by his size, unusually light hair, and by the features of the upper part of his face which was exposed, and was identified by another by his voice, although less positively. There was evidence that at about one o'clock on the day of the shooting defendant and his two confederates were together at a camp in the vicinity and were overheard talking about the money at the shanty and planning to get it, that later in the afternoon they were again overheard talking on the same subject, and that they left the camp together half an hour before the commission of the crime. Shortly after the shooting defendant appeared in the neighborhood acting in a nervous, excited and hurried manner and stated to two acquaintances, "we had some shooting up there and the neighbors are telephoning the police." There was evidence that three or four days before the murder deceased had said in the defendant's presence that defendant had taken money from him and had attempted to commit an unnatural offense upon him. Defendant fled and was apprehended seven months later in another state where he was working under an assumed name. *Held*, a verdict of guilty of murder of the first degree was justified by the evidence.

2. In a homicide case the statement by one of the witnesses to the shooting, just as the robbers were leaving the shanty, that the defendant was the one who had done it, was properly admitted as part of the *res gestæ*.

3. In such case the fact that deceased had accused defendant of criminal offenses was admissible as tending to show ill feeling between defendant and deceased, but not for the purpose of showing defendant's guilt of an independent crime. In a homicide case it is proper for the Commonwealth to prove any facts naturally tending to show defendant's hostility toward deceased.

4. In such case, conceding that the defendant returned to the town where the crime was committed for a short time on the night of the homicide, and later gave his correct name in an adjoining county, the court could not charge as a matter of law that such facts rebutted any inference that the defendant fled for the purpose of avoiding arrest.

5. In such case in view of the evidence tending to establish a conspiracy between the defendants, and also of that tending to show that three men actually committed the robbery, evidence of the conviction and sentence of the other defendants was properly admitted.

6. The court is not required in a homicide case to call the jury's attention to every item of evidence, and it is no objection to a charge that something more might have been added. The charge

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is sufficient if it embraces the important features for and against the defendant.

7. In a homicide case it is not error for the court to charge "It would be a disgrace to the administration of the law if any considerable number of innocent men were ever convicted and it would be equally a disgrace if any large number of guilty men escaped."

8. Where a summons mailed to a juror in a borough was erroneously delivered to a person of the same name residing in an adjoining township and using the same post office, and the latter appeared and on his voir dire gave his correct name and residence, and was accepted and served as a juror, such irregularity was cured and affords no ground for setting aside a verdict in a homicide case.

Argued Sept. 24, 1917. Appeal, No. 184, Jan. T., 1917, by defendant, from judgment of O. & T. Clearfield Co., May T., 1916, No. 50, on verdict of guilty of murder of the first degree in case of Commonwealth of Pennsylvania v. W. M. Dennery, alias Mike Dennery, alias Whitey. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Indictment for murder. Before BELL, P. J.

From the evidence it appears that Tom Shade, a cripple, lived alone in a shanty in Clearfield Borough and worked for a brick company. The shanty had two rooms, a front room, in which was Shade's bed, and a kitchen. On January 31, 1916, he had quit work for a day or two and was indulging, as he occasionally did, in the excessive use of liquor, having at the shanty at that time a small keg of beer and a bottle of whiskey, which he shared with some of his friends who called during the day. On that evening, at about fifteen minutes after six o'clock, while he and John Rowles, the deceased, were in the front room, and two other friends named Patrick Kelley and Michael Brawley were in the kitchen, three men armed with revolvers and their faces partly concealed by handkerchiefs entered the shanty, two in the

kitchen and the third in the front room. The latter at once grabbed Rowles' face and turned it aside with his left hand and with his right hand placed the revolver against Rowles' head and fired, killing him instantly. The assailant then covered Shade with his revolver, and with repeated threats of instant death demanded his money and compelled him to search therefor in different parts of the room, including the bed, but found none. At the same time Kelley and Brawley were held up by the two robbers in the kitchen and forced to stand facing the wall with their hands above their heads while they were searched.

Meantime the robber in the front room looked through the door into the kitchen and told his confederates to search the man with the cap on, referring to Kelley, and especially to look in the watch pocket of his pants, where they found two ten dollar bills and a five dollar bill, all of which were taken and the robbers departed.

Mike Dennery, the defendant, has an unusually light complexion and is a large man, about twenty-seven years of age, a sailor on the lakes in summer and a tramp in winter. He came to Clearfield about December 27, 1915, and until the fifteenth of January, 1916, was employed there as dish washer in a hotel. When he ceased that work he had a few dollars and remained around Clearfield until the evening of the homicide, sleeping with other tramps at a brick kiln. During this time he did some begging and lived as such men usually do, spending considerable time at a place called "the camp" on the bank of the river, where tramps built a fire and did cooking. John Rowles, the deceased, was a resident of Clearfield and worked nights at one of the brick plants. He was subject to fits, not strong in any respect, and had at one time been an inmate of the county home. He had no regular boarding place for some days prior to his death and seems to have associated more or less with tramps. He met the defendant about two weeks prior to his death and a friendship sprang up between them;

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they were often seen together and he introduced the defendant as his brother; they tried to rent a shack for their joint use and were together several times at Shade's shanty, including the morning of the day of the homicide; at which time Rowles gave Kelley two ten dollar bills and a five dollar bill belonging to Shade, and which Kelley then put in the watch pocket of his pants.

Before the homicide the defendant had become acquainted with two other tramps known as Allen and Wilson; and the three were jointly indicted for the murder of Rowles. Allen and Wilson were arrested the same night at DuBois on an outgoing freight train, and this defendant, who left Clearfield that evening, was apprehended about seven months later at Cleveland, Ohio, where he was working under an assumed name. Meantime Allen and Wilson, for their complicity in the crime, had been tried and convicted of murder in the second degree. At the trial of this defendant a large amount of testimony was submitted tending to show, inter alia, that a few days prior to the robbery he saw Shade have about eighty dollars at the shanty; that at about one o'clock on the day of the crime the three defendants were at the camp where they ate dinner, also drank intoxicating liquor and were overheard talking about the money at the shanty and planning to go and take it; that later in the afternoon they returned to camp and continued the talk upon the same subject and left there together about one-half hour before the crime was committed.

It was raining that evening and some minutes after the robbery Dennery came to one of the brick kilns wet and muddy, appeared to be nervous and excited and in a hurry and stated to two other tramps there with whom he was acquainted that, "we had some shooting up there and the neighbors are telephoning for the police..... you better beat it"; and further said, "as soon as we went in Jimmy (meaning Wilson) started to shoot"; and also in effect that he would get even with his con-

Statement of Facts—Assignment of Errors. [250 Pa. federates for keeping all of the money. Then he and the two others thus addressed caught a freight train and left Clearfield. All the defendants denied their guilt and submitted evidence tending to discredit and explain that of the Commonwealth. The evidence for the defense tended to show that this defendant returned that night and got some underwear at the brick kiln, then caught another train out before daylight and went into an adjoining county where he worked a week in an ice plant and served ten days in jail for trespassing on the railroad, and in each instance there gave his true name. Each of his confederates had a revolver when arrested; and money corresponding to that taken from Kelley was found on the car floor where one of them sat when being brought back that night from DuBois. At Clearfield this defendant was sometimes referred to as "The Big Swede," although not of that nationality. Shade, who knew him well and had a good chance to see him that night, as the room was lighted up and the handkerchief covered only the lower part of his face, testified positively that he was the man who shot Rowles; and Kelley, who based his conclusion on the assailant's voice, was of the same opinion, though not so positive.

Just after the robbers had left the shanty, Shade said to Kelley and Brawley, in effect, that it was the big Swede who shot Rowles.

There was evidence to the effect that three or four days prior to the murder Rowles had said in the presence of defendant that the latter had taken money from him and also had attempted to commit upon him an unnatural offense.

Verdict of guilty of murder of the first degree on which judgment of sentence was subsequently passed. Defendant appealed.

Errors assigned, among others, were various rulings on evidence, the charge of the court, the refusal of defendant's motion for a new trial, and judgment of the court imposing sentence.

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A. M. Liveright and James A. Gleason, with them W. H. Patterson, Jr., and D. L. Krebs, Jr., for appellant.—The evidence that deceased had charged defendant with attempting to commit an unnatural crime was erroneously admitted: Commonwealth v. Andrews, 234 Pa. 597; Commonwealth v. Haines, 257 Pa. 289; Commonwealth v. Silcox, 161 Pa. 485.

The charge was inadequate. It is the duty of the court to call the attention of the jury to the testimony of the numerous witnesses called by the defendant in support of a material point: Commonwealth v. Andrews, 234 Pa. 597; Commonwealth v. Kaiser, 184 Pa. 493; Commonwealth v. Colandro, 231 Pa. 343; Commonwealth v. Ronello, 251 Pa. 329.

The jury was not lawfully constituted: Commonwealth v. Beucher, 10 Pa. C. C. 3; Commonwealth v. Spring, 5 Clark (Pa.) 238.

Walter Welch, District Attorney, and Allison O. Smith, for appellee.—Evidence indicating that deceased had charged defendant with attempting to commit an unnatural crime was properly admitted: Commonwealth v. Haines, 257 Pa. 289.

The fact that the wrong person was summoned as a juror is not ground for the granting of a new trial in a homicide case where such person appeared, was examined on his voir dire and accepted as a juror: Acts of February 21, 1814, Sec. 1, P. L. 60, and March 31, 1860, P. L. 427, Sec. 53.

OPINION BY MR. JUSTICE WALLING, October 19, 1917:

This is an appeal by the defendant from the judgment on conviction of murder of the first degree. We have carefully examined all of the assignments of error and the entire record and find no reason to disturb the judgment. The case was well tried by court and counsel and the verdict is supported by abundant evidence.

Conceding that defendant returned to Clearfield for a

short time on the night of the homicide and later gave his correct name in the adjoining county, the court could not instruct the jury that as matter of law such facts rebutted any inference that defendant fled to avoid arrest. The statement made by the witness, Shade, just as the robbers departed was properly admitted as part of the *res gestæ*. The fact that the deceased had accused defendant of criminal offenses was admissible on the question of motive, as it tended to show ill feeling between them. A man would naturally hate one who had accused him of attempting to commit an infamous crime. This evidence merely went to the extent of showing that the deceased had made such an accusation against defendant and for that purpose it was competent. See *Commonwealth v. Andrews*, 234 Pa. 597. As Rowles was not resisting the robbers, his murder was such as might suggest some other motive, hence it was proper for the Commonwealth to prove any facts naturally tending to show the defendant's prior hostility to the deceased. The evidence did not establish defendant's guilt of an independent crime and was not admissible for that purpose: *Commonwealth v. Haines*, 257 Pa. 289.

The charge was comprehensive and accurate, embracing the important features for and against the defendant; and was fair and adequate. The court is not required to call the jury's attention to every item of evidence, and it is no objection to a charge that something more might properly have been added.

"It is not possible nor even desirable that the judge should refer to and emphasize every item of evidence on both sides in a way that the counsel would consider adequate. In doing so he would run much risk of coming to speak as an advocate rather than a judge. Nor is he required to go over all the evidence on any particular point every time he refers to the point in the course of his charge. It is enough if he gives to the jury a general review of the evidence on the one side and the other, which fairly and adequately presents the respective con-

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tentions of the parties, with enough reference to the items of evidence to assist the jury in recalling it as a substantial whole, and to appreciate its bearing": Commonwealth v. Kaiser, 184 Pa. 493, 499. It was not legal error for the court to say to the jury that, "It would be a disgrace to the administration of the law if any considerable number of innocent men were ever convicted and it would be equally a disgrace if any large number of guilty men escaped." In view of the evidence tending to establish a conspiracy between the defendants, and also of that tending to show that three men actually committed the robbery, evidence of the conviction and sentence of the other defendants was proper for the consideration of the jury in this case.

There was a John Rodkey residing in Houtzdale Borough, and also a John Rodkey residing about two miles from the borough, in an adjoining township. The borough was the post office of both. John Rodkey, of Houtzdale, was drawn as a juror and the postal authorities delivered the summons to the one residing in the township. He appeared as a juror and on his voir dire gave his correct residence as above stated. He was accepted and served as a juror in this case. There was no fraud or impersonation. Conceding that the summons was intended for the other John Rodkey, it was merely such an irregularity as was cured by the statute and affords no ground for setting aside the verdict. See Commonwealth v. Potts, 241 Pa. 325.

The assignments of error are all overruled, the judgment is affirmed and the record is remitted for the purpose of execution.

Town Meeting Party Nomination Papers (No. 1).

Elections—Nominations—Candidates—Official ballot—Party nominees.

Under the Act of April 29, 1903, P. L. 338, relating to elections,

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a person who has been nominated for public office by a political party at a primary election, may also be nominated by a political party subsequently formed, by means of nomination papers, and is entitled to have his name printed in the party column of each party which nominates him.

Argued Nov. 1, 1917. Appeal, No. 309, Jan. T., 1917, from order of C. P. No. 3, Philadelphia Co., Sept. T., 1917, No. 4104, sustaining objections to nomination papers, In re Nomination Papers of Town Meeting Party Purporting to Place in Nomination Francis F. Burch, W. T. Colburn, Dennis J. Grace, Louis Karstaedt and I. Walter Thompson, for the Offices of Councilmen for the Forty-Sixth Ward of the City of Philadelphia. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Reversed.

Objections to nomination papers.

The facts appear in the following opinion by WESSEL, J., specially presiding; CARR and DAVIS, JJ., concurring:

On September 19, 1917, the Washington Party was entitled to nominate candidates for Common Council, in the 46th Ward of this city. On that day the qualified electors of that party in that ward, placed in nomination, inter alia, Francis F. Burch, W. T. Colburn, Louis Karstaedt, and I. Walter Thompson for the offices of Common Councilmen. Subsequently the same men were nominated for the same offices by nominators who desire them placed in nomination under the title which had been preëmpted in that ward as the "Town Meeting Party." This is objected to, it being contended that when a person is designated by a regular political party as its candidate for a designated office, and such person does not decline such nomination other electors cannot, by an independent nominating petition secure a duplication of his name upon the ballot, under some other appellation. This objection is supported by *Commonwealth v. Martin*, 21 Pa. C. C. Reps. 422 (1898). That was a petition for a peremptory mandamus against the

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secretary of the Commonwealth, to require him to file certain nomination papers. It appeared that the petitioner, and other qualified electors of this State, constituting in number more than two per cent. of the largest entire vote cast for any officer elected at the last preceding State election, signed a nomination paper for the purpose of placing in nomination for the office of governor, William A. Stone; for the office of lieutenant-governor, J. P. S. Gobin; for secretary of internal affairs, James W. Latta; for congressman-at-large, Galusha A. Grow and Samuel A. Davenport; for judges of Superior Court, W. W. Porter and W. D. Porter. That nomination paper thus signed was duly presented on October 4th to the defendant, David Martin, Secretary of the Commonwealth, at his office in the City of Harrisburg, for the purpose of having the same filed in accordance with the law. He refused to receive or file said paper. The candidates presented by that nomination paper, had previously been nominated by the State convention of the Republican party, and its nomination for the same several and respective offices for which they had been named had been duly certified to the secretary of the Commonwealth in such a way to secure a place for their names on the official ballot. In refusing the petition, Mr. Justice STEWART (then specially presiding as President Judge of the 39th Judicial District), said (p. 423) :

"In another proceeding determined only yesterday, in which we adjudged invalid the certificate of nomination, filed on behalf of the same political party that has offered this nomination paper, we endeavored to point out the distinction made by the law between political combinations, some of which are to be regarded as parties, and others, lacking certain characteristics as less than parties. The second section of the Act of July 9, 1897, P. L. 223, known as the ballot law, relates wholly and exclusively to political combinations which the law regards as parties, and so designates them. The third section makes provisions for such combinations as are less than

parties, and such are referred to as political bodies. The word party nowhere occurs in this section.

"The distinction thus made in the act governs not merely in procedure, but the rights and powers of these different political combinations with respect to the official ballot are determined therefrom.

"A political party—that is a party within the legislative sense—has a right to have a separate column on the ballot for its own ticket, and it is a matter of no concern to the law, so far as regards the composition of the ballot, who compose that ticket, whether it includes the same names that appear on the other tickets or not. It is an unquestioned right that each party has to name its own ticket and constitute it as it pleases.

"But with respect to combinations, which are less than parties, the law is different. When either of the established and recognized parties has placed a candidate in nomination for a particular office, and has secured for such candidate a place on the official ballot, what possible end is served by allowing the same name to again appear in connection with the same office by virtue of nomination papers? Once upon the ticket every elector will be afforded the privilege of voting for this particular person in a sufficiently convenient way. It is no answer to say that it would be helpful to the political body that asks the privilege. The law was not designed to advance the interests of political combinations, but to secure a safe and convenient ballot, that in its turn would secure an honest and intelligent expression of the popular will. It regards a mere political combination,—one less than a party—as a body of dissenters, and affords them facility for expressing their dissent on the official ballot by placing thereon a candidate; but it must be a candidate not already nominated by the party. The manifest purpose of Section 3, of the act we are considering, was to insure to the electors of the State a liberty which no party discipline could hinder or restrain and to enable them to attempt at least by the use of the

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common ballot, the accomplishment of something that no party has provided for. Beyond this it does not go. There is room on the official ballot for the ticket of any party; there is likewise room for any candidate not included in one or the other of the party tickets, who may be placed in nomination by nomination papers, and thus every political combination is provided for, as we still have a ballot reasonable in size and readily understood by the average voter. But if once we allow that candidates nominated by a party may be nominated again and again by nomination papers, the result would be a ballot impracticable and unintelligible to the ordinary understanding."

But the nominators contend that that decision is not controlling, because of the subsequent legislation. They urge that the law, as then construed by Mr. Justice STEWART, has been changed by the Act of April 29, 1903, P. L. 338, which provides, in its second section (which amends the 14th section of the Act of June, 1893, as amended), *inter alia*, (p. 342): "Whenever any candidate shall receive more than one nomination for the same office, his name shall be printed once, and the names of each political party, so nominating him, shall be printed to the right of the name of such candidate, arranged in the same order as candidates' names are grouped."

With this contention we are unable to agree. Justice STEWART'S decision was rendered in 1898. The legislation which was enacted some five years later, did not amend either the second or third sections of the Acts of 1893, as amended by the Act of 1897, then construed. The amendatory Act of 1903 merely cites and amends the ninth, fourteenth, twenty-second, twenty-seventh, twenty-eighth and thirtieth sections of those acts. Those amendments relate to the duties of certain officers; to the form and arrangements of the ballots; to the duties of the voter in the polling place; to the counting of the votes and the preservation of the ballots. But those amendments make no change in the legislation, designat-

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ing by whom and in what manner nominations may be made. A second section of that act designates who shall be entitled to file nomination papers: Butler Township Republican Nomination Papers, 14 Pa. C. C. Reps. 470 (1894).

It is also apparent from the part of the paragraph of the Act of 1903, above quoted (P. L. 342), that the legislature was considering then not the rights of the persons exercising their prerogatives as nominators but the arrangement of the ballot as regards those candidates who should have received the nomination of more than one "Political Parties." That there is a clear distinction between such a body and those placing electors in nomination by nominating papers, appears from Mr. Justice STEWART'S opinion In re Citizen Party Nominations, 21 Pa. C. C. Reps. 417 (1898), where he says (p. 418):

"While our legislation recognized political combinations, it has nothing to do with their creation, continuance or dissolution. Not being born under the law, they are not subject to it. They are left free to govern themselves and regulate their own actions. The law does not compel the citizen to attach himself to any; he may or may not, as suits his pleasure. When he does the law has nothing to do with the terms or conditions of his membership. It takes no notice of his standing in the society, except it be official, and then only in a single case, and cares nothing whether he gives much or little support, whether he votes its ticket straight or scratched regularly or only occasionally. The measure of his activity and allegiance concerns only himself and the party.

"But this indifference of the law ceases when the action of a political combination brings it into relation with what is known as the official ballot. When an association or combination of electors demands for its candidates a place on the ballot, and its right to this is challenged, the law concerns itself to inquire just

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what its rights are, and this involves an inquiry into the composition and character of the combination.

"It is with combinations that the law deals, not the individual elector, in such questions, and with respect to the former, it makes its own distinctions. All political combinations are not alike—that is, not of like grade, and their rights differ correspondingly.

"One clear distinction the law makes between combinations which are parties, and those which are less than parties. Every party is necessarily a combination, but the converse that every combination is a party, is very far from being true. The distinction is easily discoverable in the different provisions which are made for each kind of combination in the Act of 1893 as amended by the Act of 1897, and known as the ballot law.

"The combination which is a party places its candidates in nomination by a proceeding wholly different from that which a combination less than a party must follow to accomplish the same object. The former files certificates of nomination, the latter nomination papers, a difference of sufficient importance to provoke the present controversy.

"Since it is the legislative understanding of what is meant by the term political party that is to govern, it cannot be in the least helpful to have recourse to the lexicographers. We shall find no definition that expresses the legislative idea. For instance, an admitted essential feature of a political party within legislative meaning, that it shall have polled a certain per centum of a certain vote cast at the next preceding election. We shall not find that expressed in any definition.

"To discover what is meant by the term we are thrown back upon the act or series of acts which relate to the general subject, and to these we are confined. Confessing our inability to put it all within the limits of a definition, we can yet indicate certain essential characteristics which are sufficient for present purposes. We have already referred to one—the combination must

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have polled a certain proportion of the highest vote cast at the next preceding election. Another is, that it must, in its aims and purposes, be as broad as the State itself. That is to say, its purpose must be to accomplish results affecting and concerning the entire citizenship, as distinguished from the particular section or district. Not that it must have supporters in every political subdivision of the State; it may have them in but a single county, and yet be a political party; but its object must be of general concern, so that it can invite to its support the people of the State, irrespective of locality. Where both these features are found in any combination, it is a party within the legislative meaning; where either is lacking, it is a combination less than a party." To that may be added the opinion of Judge WEISS in Jeffries' nomination, 24 Pa. C. C. Reps. 529 (1900); Judge PENNYPACKER's opinion In re McKinley-Citizen's Party, 19 Pa. C. C. Reps. 132 (1896); and In re Public Opinion Party, 27 Pa. C. C. Reps. 145 (1897); Judge McMICHAEL's opinion In re Citizen's Party Nomination, 22 Pa. C. C. Reps. 65 (1898); Judge SIMONTON's opinion in Handley v. Reeder, 18 Pa. C. C. Reps. 456 (1896).

The subject is an important one. We regret that the necessity for an immediate decision has limited our research to a few hours. Our conclusions may cause the electors to exercise a little more care and to expend some additional time in the marking of their ballots, but they may still vote for the nominee above referred to, if they be their choice.

The court sustained the objections filed by James A. Walker, E. S. Krombolz and R. Emmett Dillon to the nomination papers of the Town Meeting Party, placing in nomination Francis F. Burch, I. Walter Thompson, Louis Karstædt and W. T. Colburn for the offices of common councilman in the Forty-sixth Ward of Philadelphia, and restrained the county commissioners from printing the said Town Meeting nominations upon the official ballot for said ward. Francis F. Burch, W. T.

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Colburn, I. Walter Thompson and Louis Karstædt ap-
pealed.

Errors assigned were in sustaining the objections and
the order of the court.

Isidore Stern and James Gay Gordon, for appellants.

Thomas James Meagher, for appellees.

PER CURIAM, November 1, 1917:

In entering its decree the learned court below regarded as controlling what was said by our Brother STEWART in *Commonwealth v. Martin*, 21 Pa. C. C. Reps. 422, when he specially presided in that proceeding in the Court of Common Pleas of Dauphin County. Under legislation passed five years later—the Act of April 29, 1903, P. L. 338, the appellants have the right denied them by the decree from which they have appealed. In view of that legislation the decree of the court below is reversed and, now, November 1, 1917, upon due consideration, it is ordered, adjudged, and decreed that the objections filed by James A. Walker, E. S. Krombolz and R. Emmett Dillon to the nomination papers of “The Town Meeting Party,” placing in nomination Francis F. Burch, I. Walter Thompson, Louis Karstædt and W. T. Colburn for the offices of common councilmen in the Forty-sixth Ward of the City of Philadelphia be dismissed and, it is further ordered, adjudged, and decreed that the county commissioners print the names of the said “Town Meeting Party’s” nominees upon the official ballots for said ward, the costs on this appeal and below to be paid by the County of Philadelphia.

Town Meeting Party Nomination Papers (No. 2).

Argued Nov. 1, 1917. Appeal, No. 810, Jan. T., 1917, by John W. Graham, Jr., Robert E. Lamberton, William W. Mentzinger, Jr., and C. Lawrence Smith, from order of C. P. No. 3, Philadelphia Co., sustaining objections to nomination papers in the Matter of the Nomination Papers of the Town Meeting Party Purporting to Place in Nomination John W. Graham, Jr., Robert E. Lamberton, William W. Mentzinger, Jr., and C. Lawrence Smith for the Office of Common Councilmen of the Twenty-second Ward of the City of Philadelphia. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHISKER and WALLING, JJ.

Objections to nomination papers. Before CARR, J.

The facts appear in Town Meeting Party Nomination Papers, 259 Pa. 231 (No. 1).

The court sustained the objections to the nomination papers. John W. Graham, Jr., Robert E. Lamberton, William W. Mentzinger, Jr., and C. Lawrence Smith appealed.

Errors assigned were in sustaining the objections and the order of the court.

Isidore Stern and James Gay Gordon, for appellants.

Thomas James Mcagher, for appellees.

PER CURIAM, November 1, 1917:

As application was not made to advance the hearing of the above case, it is not now properly before us. We, therefore, make no order as to it. It is to be assumed, however, that what we have this day determined in the case of the Forty-sixth Ward will be regarded as controlling.

**Robert Grace Contracting Company, Appellant, v.
Norfolk & Western Railway Company.**

Contracts—Written contract—Subsequent parol agreement—Advancing time for completing work—Absence of provision as to increased compensation—Quantum meruit for increased cost—Practice, C. P.—Statement of claim—Insufficiency—Affidavit of defense in nature of demurrer—Practice Act, May 14, 1915, P. L. 483.

1. The effect of an affidavit of defense in the nature of a demurrer filed under the Practice Act of May 14, 1915, P. L. 483, is to test the sufficiency of the plaintiff's statement, which must be self-sustaining and set out a good cause of action.

2. The legal effect of writings attached to the pleadings is for the court and cannot be controlled by averments of the parties.

3. Letters exchanged in confirmation of a verbal agreement will be presumed to correctly state it, especially where they are retained without objection.

4. A new agreement will supersede an old one so far as they cannot be executed together.

5. Where a parol agreement entered into subsequent to the execution of a written contract, modifies the latter only in the respect that the work shall be completed at an earlier date, a recovery cannot be had on a quantum meruit for all work thereafter done on the theory that the original contract has been abrogated.

6. In an action by a construction company against a railroad company, it was alleged that plaintiff entered into two written contracts with the defendant to construct two sections of a railroad bed for defendant by December 1st. All of the work was completed on time, accepted and paid for. Plaintiff subsequently brought suit on an alleged verbal agreement, made during the progress of the work, and confirmed by letters, contending that such agreement superseded the original contracts. The alleged change was for the completion of the work at earlier dates, November 7th as to one contract, and October 7th as to the other, thereby greatly increasing the cost of construction. The work was not completed on the earlier dates, but on December 1st as to the one contract, and a week earlier as to the other, due to defendant's alleged dilatoriness in furnishing rails required under an independent verbal agreement made subsequent to the main contracts. The alleged new arrangement made no change in the work to be done or the price to be paid, nor did it abrogate a provision for award by defendant's chief engineer, and plaintiff sued on a quan-

tum meruit. From the time of the commencement of the work under the new agreement plaintiff gave notice from time to time that it would expect additional compensation. *Held*, plaintiff's statement was insufficient and judgment was properly entered for the defendant.

Malone & Son v. Philadelphia & Reading R. R., 157 Pa. 430, distinguished.

Argued Oct. 12, 1917. Appeal, No. 127, Oct. T., 1917, by plaintiff, from judgment of C. P. Allegheny Co., Oct. T., 1916, No. 625, entered for want of a sufficient statement of claim in case of Robert Grace Contracting Company v. Norfolk & Western Railway Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Assumpsit on quantum meruit based on alleged verbal agreement to complete at an earlier date work being done under written contracts. Before SHAFER, P. J.

The facts appear by the opinion of the Supreme Court.

Defendant filed an affidavit of defense in the nature of a demurrer under the Practice Act of May 14, 1915, P. L. 483.

The lower court entered judgment for the defendant. Plaintiff appealed.

Error assigned, among others, was in entering judgment for the defendant.

William Watson Smith, of Gordon & Smith, for appellant.—The advancing of the time for the completion of the work, necessitating a change of method in doing the work and consequent increased expense, entitles plaintiff to recover a reasonable value of such increased cost: Edmundson v. Pittsburgh School District, 248 Pa. 559; Malone v. Philadelphia & Reading R. R., 157 Pa. 430; Vicary v. Moore, 2 Watts 451; Reber v. Brownback, 27 Pa. Superior Ct. 471; Salt Lake City v. Smith, 104 Fed. Repr. 457; Somerset Borough v. Ott, 207 Pa. 539.

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Richard H. Hawkins, of Dalzell, Fisher & Hawkins, with him Theodore W. Reath, for appellee.—The alleged modification of the original written contracts changed them only in respect to the time of the completion of the work and did not alter the provisions thereof requiring the engineer's certificate for work done and for extra compensation. The plaintiff is therefore not entitled to recover: *McGrann v. The North Lebanon Railroad Co.*, 29 Pa. 82; *O'Reilly v. Kerns*, 52 Pa. 214.

The statement of claim exhibits the original contracts of writing which were the basis of the work, and which make the decision of the chief engineer upon any controversy final and a condition precedent to payments for the work, and as the statement fails to allege an award by, or fraud on the part of the chief engineer, it discloses no cause of action: *Adinolfi v. Hazlett*, 242 Pa. 25; *McManus v. Philadelphia*, 201 Pa. 632; *Werneberg v. Pittsburgh*, 210 Pa. 267; *Jonathan Clark & Sons Company v. Pittsburgh*, 217 Pa. 46.

The case was properly decided upon demurrer: *Rosenblum v. Stolzenberg*, 36 Pa. Superior Ct. 644; *Martinsburg & Potomac Railroad Company v. March*, 114 U. S. 549.

The legal effect of writings which are exhibited with pleadings is a question of law and cannot be controlled by contradictory averments in the pleading itself: *Leechburg Building & Loan Association v. Kinter*, 233 Pa. 354.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

This is an action of assumpsit to recover a balance alleged to be due for railroad construction.

Defendant is a Virginia railroad company and plaintiff is a Pennsylvania construction corporation. In the spring of 1915 defendant awarded plaintiff contracts for the construction of two sections of railroad bed in Virginia. One of the contracts bears date of March 31st and the other April 8, 1915. Each contract calls for the completion of the work on or before December 1st of that

year. The contracts are alike in form, except as to date and reference to the subject-matter, and are very exhaustive, each covering forty-eight printed pages. The entire work was placed under the control and supervision of defendant's chief engineer. As the work progressed, plaintiff was to be paid monthly eighty-five per cent. of the engineer's estimates and balance on completion. The contracts provide, *inter alia*, that "All questions, differences, or controversies, which may arise between the parties hereto in regard to any work to be done under this agreement, whether as to its performance or non-performance, or in any way whatever pertaining to or connected with the said work, shall be referred to the said chief engineer and his decision shall be in the nature of an award, and shall be final and conclusive upon both parties, unless the same shall be reversed or modified by the president of the company, upon appeal by either party; and compliance on the part of the contractor with every such decision of the chief engineer shall be a condition precedent to the right to receive any payment hereunder. This contract, and every provision thereof, may be modified or extended by the mutual agreement of the parties hereto, subject only to the approval of the company." And, further, that the final estimate of the chief engineer shall be conclusive upon the parties unless modified by the defendant's president on appeal. So far as appears all of the work was completed, accepted and paid for as required in the contracts. In fact the work under one of the contracts was completed on the day called for, to wit, December 1, 1915, and the other a week in advance thereof. Plaintiff's statement in this case, however, makes no claim on these contracts but sets up an alleged verbal agreement, made during the progress of the work and confirmed by letters, which it avers superseded the originals. The change alleged was for a completion of the work at an earlier date, to wit, under one contract by October 7th and under the other by November 7, 1915; and provid-

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ing for double shift work, etc., to bring about that result. Plaintiff avers that this change greatly increased the cost of the work, and, as no price was fixed by the new agreement, claims on a quantum meruit for all work thereafter done, making a balance of \$62,237.20, after crediting the amount received according to the provisions of the old contracts. Plaintiff also avers that about the time of beginning work under the new agreement, and from time to time thereafter, it gave notice to defendant that it would expect to receive additional compensation therefor; and that such notices were received by defendant without protest being made thereto, until long after the completion of the work. It further avers that by reason of certain specified defaults on part of defendant, the plaintiff was entitled to approximately a month and a half additional time in which to complete the work.

The defendant filed an affidavit of defense, raising questions of law only, in accordance with Section 20 of the Practice Act of May 14, 1915, P. L. 483-486. This was in effect a demurrer to plaintiff's statement, and, after hearing thereon, the court below filed an opinion and entered judgment for the defendant; from which plaintiff took this appeal. The practice accords with the statute and the conclusion of the lower court seems free from error. Being a demurrer, plaintiff's statement must be self-sustaining and set out a good cause of action. The only claim here made is on a quantum meruit to recover for the value of the work as done, on the theory that the original contracts had been abrogated. It is not a suit for extra work, or for extra pay because of force or double-shift work, or for damages for delay caused by defendant's default. It ignores the original contracts, while properly setting out copies thereof, and sues for the value of the work as if no price had ever been fixed. This in our opinion cannot be done. The new arrangement made no change in the work to be done or in the price to be paid. The case is quite similar

to that of *McCauley v. Keller*, 130 Pa. 53, where the contract for railroad construction specified second class masonry and by a new agreement first class masonry was in part to be substituted, "as directed by the engineer," and to be paid for at what it was reasonably worth. It is there held that the new work must be done under the provisions of the old contract and subject to the decision of the engineer as therein provided. Mr. Justice CLARK in delivering the opinion of the court says, "It was undoubtedly competent for the plaintiff, by parol, to show a new and distinct agreement subsequent to the contract under seal, whereby, upon a new consideration, the original agreement was changed and the plaintiffs agreed to perform additional work, or the same work in a different manner. . . . But, in such cases, the special contract will be pursued as far as it can be traced in the intention of the parties. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it was made. . . . It is plain, then, that the sealed instrument must be supposed to contain the agreement of the parties to the full extent that it has not been modified by the subsequent parol contract, and that both taken together (the former being subject to the latter) state the agreement of the parties. If there had been no provision for estimates, etc., the plaintiff would, without doubt, have been entitled to recover upon a quantum meruit whatever he could show the work was worth; but all the work was to be done as directed by the engineer, and was to be paid for as estimated by the engineer in charge during the month. The work covered by the parol agreement was the same work which was embraced in the special contract. It is alleged simply that it was to be performed in a different way if the engineer required it to be so done, and if the estimate of the engineer was not to determine its nature and extent it would doubtless have been so stated." In *McGrann*

v. The North Lebanon Railroad Co., 29 Pa. 82, there was a change of location of the railroad, except at the termini, and it was held that the prices for the grading, masonry, etc., remained under the old contract and that recovery could not be had on a quantum meruit. There, however, the right to change the route was specified in the contract.

A new agreement will supersede the old so far as they cannot be executed together. See *Ellmaker v. Franklin Fire Insurance Co.*, 6 W. & S. 439; *Prouty v. Kreamer*, 199 Pa. 273, 276. In the case at bar plaintiff had the right under the original contracts to complete the work before the first of December, so the alleged new agreement to speed up the work and finish it at an earlier date did not conflict with the other; both could be executed together. The new arrangement referred only to the matter of speeding up and completion of the work, as to all else the old contract was not changed. What plaintiff did amounted to a fulfillment of the original contracts. The extent to which a new contract supersedes the old depends upon the nature of the change and the intention of the parties. Here there is nothing to indicate that any change was intended except in the matter of time. In fact the acts of the parties rebut such intention. The notices which plaintiff avers were given defendant, above referred to as to additional compensation, show that plaintiff did not then consider the original contracts terminated or that the work was being done on a quantum meruit. The additional compensation clearly referred to a claim for pay, beyond that named in the original contracts, because of the speed work. If the work was to be paid for at its reasonable value as force work when so paid there would be nothing more due and there could be no claim for additional compensation. Aside from that, as we understand the facts, the work was paid for on monthly estimates and at the price named in the original contracts until the end. Parties, who after making a new contract, continue to act

under the old are bound by it, at least so far as they are not inconsistent. See *McGrann v. The North Lebanon Railroad Co.*, supra. The present suit is not founded on any estimate or award of the chief engineer, but on the theory that the contracts requiring such engineer's approval, as a prerequisite to a right of action, were abrogated by the alleged new agreement.

In the case of *Malone & Son v. Philadelphia & Reading R. R.*, 157 Pa. 430, relied upon by plaintiff, the facts were different. That was a contract for building a bridge, enlarging tunnels, approaches thereto, etc., and it was substantially changed by subsequent agreement. The manner of enlarging the tunnel was changed from removing loose material at the bottom to excavation of rock at the top thereby greatly increasing the cost, and the approaches were greatly enlarged. In fact one part of the work was made six times as expensive as that called for in the original contract. There the contracts could not stand together and the new was held to supplant the old.

The parties to a written contract may modify or set it aside. The question here is, did they do so and to what extent? The statement sets out copies of letters in confirmation of the alleged verbal agreement. And while they show that plaintiff promised to speed up and double shift, they do not show an agreement on its part to complete the work at the earlier dates requested in defendant's letters. The legal effect of writings attached to the pleadings is for the court and cannot be controlled by the averments of the parties: *Leechburg Building & Loan Association v. Kinter*, 233 Pa. 354. Letters exchanged in confirmation of a verbal agreement will be presumed to correctly state it, especially where they are retained without objection. Plaintiff's original bid refers to double shift as one of its methods of work; and the contracts authorize the chief engineer to speed up the work, but not to require its completion before the time specified.

Bids were submitted and the contracts made on defendant's estimates purporting to give the approximate amounts, and the work somewhat exceeded the estimates. But as plaintiff was paid by the yard such excess could afford no ground for a quantum meruit claim, especially as the estimates were made in good faith and did not purport to be accurate. In general such estimates are only approximate: *Coal & Iron Ry. Co. v. Reherd*, 204 Fed. Rep. 859. Plaintiff also avers that it was delayed approximately three weeks on one of the sections by defendant's dilatoriness in furnishing rails pursuant to an independent verbal agreement made subsequent to the main contracts. But that is given as a reason for delay and not as a separate claim. The price for every item of work done was fixed by the contracts and in our opinion was not changed or set aside and therefore there is no basis for a recovery of what the work may have been reasonably worth, and that is the only claim made.

The assignments of error are overruled and the judgment is affirmed.

Commonwealth v. Wooley, Appellant.

Criminal law—Murder—Voluntary manslaughter—Involuntary manslaughter—Charge—Conflicting instructions—Erroneous instructions—Pointing gun to frighten—Evidence—Self-defense—Scope of direct examination of defendant—New trial.

1. Where the plea to an indictment for murder is that defendant was acting in self-defense, it is reversible error to refuse to permit the defendant, while being examined as a witness in his own behalf, to be asked whether at the time he fired the shot he thought he was in peril of his life or of great bodily harm. The weight to be accorded such testimony is for the jury.

2. In such case the trial judge erred in refusing to correct such error on the ground that, in his judgment, there had been developed on the cross-examination of the defendant what would have been an affirmative answer to the disallowed question, where it appeared that in no one of defendant's answers to the questions put to him by the district attorney did he say that, when he shot deceased, he

thought he was in peril of his life or of great bodily harm. His mere admission that he was in fear is not the equivalent of his unqualified declaration that he had acted in self-defense because he thought that he was in peril of his life or of great bodily harm.

3. Where correct and erroneous instructions are given in a charge it is not to be conjectured, especially in a capital case, which the jury followed.

4. On the trial of an indictment for murder where defendant testified that when he took the gun into his hands he was under the impression that it was unloaded and that his intention was to use it to frighten the deceased away, the error committed in charging that if such were the honest belief and purpose of the defendant he would be guilty of voluntary manslaughter, the trial judge inadvertently using the word "voluntary" instead of "involuntary," is not cured by the fact that the court had in a previous part of the charge carefully distinguished between the two grades; and where in such case a conviction of voluntary manslaughter followed, a new trial was awarded.

Argued Oct. 15, 1917. Appeal, No. 9, Oct. T., 1917, by defendant, from sentence of O. & T. Bradford Co., Sept. T., 1916, No. 1, on verdict of guilty of voluntary manslaughter in case of Commonwealth v. George Mitchell Wooley. Before BROWN, C. J., POTTER, MOSCHIZISKE, FRAZER and WALLING, JJ. Reversed.

Indictment for murder. Before MAXWELL, P. J.

The facts appear by the opinion of the Supreme Court.

Verdict of guilty of voluntary manslaughter upon which sentence was passed. Defendant appealed.

Errors assigned, among others, were various rulings on evidence and the charge of the court.

William G. Schrier, with him *Charles E. Mills*, for appellant.—It is reversible error to refuse to permit the defendant on trial for murder to be asked on direct-examination whether at the time he fired the shot he thought he was in peril of his life or of great bodily harm: Commonwealth v. Garanchoskie, 251 Pa. 247; Runyan v. The State, 57 Ind. 80; West v. The State, 59

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Ind. 113; Commonwealth v. Woodward, 102 Mass. 155; Wallace v. United States, 162 U. S. Repr. 466.

An error committed by the court in charging that if defendant drew the gun thinking it was empty, for the purpose merely of frightening deceased, and shot and killed the deceased, he would be guilty only of voluntary manslaughter, inadvertently using the word "voluntary" instead of "involuntary," is not remedied by a correct statement of the distinction between voluntary and involuntary manslaughter in another part of the charge: *Selin v. Snyder*, 11 S. & R. 319; *Gearing v. Lacher*, 146 Pa. 397; *Baker v. Hagey*, 177 Pa. 128; *Commonwealth v. Deltrick*, 221 Pa. 7; *Commonwealth v. Greene*, 227 Pa. 86.

David J. Fanning, District Attorney, for appellee.

OPINION BY MR. CHIEF JUSTICE BROWN, January 7, 1918:

The appellant was convicted in the court below of voluntary manslaughter on an indictment charging him with murder. His plea was that he was acting in self-defense, under circumstances which made him believe that his life was in danger, or that he was about to suffer great bodily harm, and that to save his life or avoid such harm he shot the deceased. While he was being examined as a witness in his own behalf, he was asked the following question: "At the time you fired this shot will you state to the court and jury whether or not you thought you were in peril of your life, or of great bodily harm?" This was disallowed, and its disallowance is the subject of the first assignment of error.

The appellant was a competent witness for himself, and the question which he was not permitted to answer bore directly upon the defense he was making. He alone, of all the witnesses called by him, could testify as to whether he really thought he was in peril of his life or of great bodily harm, and no testimony could have

been more competent than his own as to his belief that he was in such danger. What credit was to be given to him was for the jury under all the circumstances surrounding the homicide, and it is to be remembered that they might fairly have inferred to his prejudice that he had not been in fear of bodily harm if he had failed to so testify. The refusal to permit him to do so was clear error: *Commonwealth v. Garanchoskie*, 251 Pa. 247; *Wallace v. United States*, 162 U. S. Rep. 466; *Commonwealth v. Woodward*, 102 Mass. 155; *Batten v. The State*, 80 Ind. 394; *Taylor v. The People*, 21 Colo. 426; *Elliott on Evidence*, Vol. 4, Sec. 3041. In his opinion refusing a new trial the trial judge admitted this error, but refused to correct it, because, in his judgment, there had been developed on the cross-examination of the defendant what would have been an affirmative answer to the disallowed question. This was not so. In no one of his answers to the questions put to him by the district attorney does he say that, when he shot the deceased, he thought he was in peril of his life or of great bodily harm, and it was not judicially frank or fair to hold that his mere admission that he was scared and in fear was the equivalent of his unqualified declaration that he had acted in self-defense because he thought he was in peril of his life or of great bodily harm. The first assignment of error is sustained.

The defendant testified that, when he took the gun in his hands, he was under the impression it was not loaded, and that his intention was to use it to frighten the deceased away. In commenting upon this testimony the following instruction was given to the jury and is the basis of the second assignment: "Now we will say right here, for fear we may forget it, if, under all the circumstances of this case, if you find in the testimony that this defendant honestly and in good faith believed this gun was empty, and he took it out there simply for the purpose of frightening this man away by its appearance, and had no intention in his mind at the time, of shooting

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him, and he drew up the gun in the manner in which he described, for the purpose of frightening him, not knowing it was loaded, and he shot and killed this man, we think that he would be guilty of only voluntary manslaughter, if you find that under the evidence in this case." This palpable error is also admitted in the opinion refusing a new trial, the trial judge saying: "We, inadvertently, in charging the jury, in that part of the charge quoted and assigned as error, used the word 'voluntary' where we intended to use the word involuntary." He then adds: "The jury certainly could not have been misled by this slip, for the reason that we just previously instructed them, carefully, as to manslaughter, and defined and distinguished between the two grades." The defendant was convicted of voluntary manslaughter, and it is most fairly argued that he may have been so convicted under the instruction complained of by the second assignment, which ought to have been that he was entitled to an acquittal on the indictment, if the jury believe his version of the shooting. Whatever proper instructions may have been given in other parts of the charge, they did not cure the palpable misdirection which the jury may have regarded as what the trial judge intended to be a correct instruction to them, for there was nothing doubtful or ambiguous in it. In attempting to justify himself in failing to correct his error, on the motion for a new trial, the trial judge utterly ignored the oft-repeated rule that, where correct and erroneous instructions are given in a charge, it is not to be conjectured, especially in a capital case, which the jury followed. It is enough to know that they may have followed the erroneous ones on a point vital to the defendant: *Commonwealth v. Gerade*, 145 Pa. 289; *Commonwealth v. Deitrick*, 221 Pa. 7; *Commonwealth v. Greene*, 227 Pa. 86. The second assignment of error is also sustained and the judgment reversed with a *venire facias de novo*.

Re Investigation of Paul J. Sherwood, Appellant.

Attorneys—Improper conduct—Breach of fidelity to court—Misbehavior in office—Charge of prejudice against judges—Remarks in argument in Federal Court for removal of cause from Common Pleas Court—Privilege—Constitution of United States, Sec. 2, Art. III—Act of Congress of March 3, 1911.

1. A court has power to strike the name of a member of the bar from the roll for official misconduct in or out of court, irrespective of where the misconduct occurs. A state court may disbar one of its attorneys for misconduct committed in a Federal Court or in any other state court.

2. The purpose of Art. III, Sec. 2 of the Constitution of the United States extending to the Federal courts jurisdiction in controversies between citizens of different states, was to secure for controversies between citizens of different states a tribunal independent of local influences and surroundings, whether the questions for determination are of fact or law, and it was in pursuance of such purpose that the Act of Congress of March 3, 1911, 36 Stat. 1094, was passed, providing that a defendant in a suit in a state court may remove it to the proper Federal court at any time before the trial thereof, if it shall appear to said court that he will not, from prejudice and local influence, be able to obtain justice in the state court.

3. The right of removal from a state court, on the ground of local prejudice, is not confined to prejudices which may affect a jury but extends to those which may influence a judge.

4. The test as to whether remarks made by an attorney in derogation of the judges of a Common Pleas Court during the course of an argument for the removal of a cause to the Federal courts on the ground of local prejudice, constitute misbehavior in his office as attorney is not whether the words spoken are true, but whether they were spoken in the course of a judicial proceeding and were relevant or pertinent to the subject or cause of inquiry.

5. A statement made by a member of the Luzerne County Bar in the United States District Court during the course of an argument in support of a rule to remand to the former court a cause which had been removed to the district court, to the effect that "the five judges of the Luzerne court are so prejudiced that Stough (the defendant) could not get a fair trial in our courts," was privileged, since the Act of Congress required his client to show that prejudice existed in order that the cause be removed, and what was said was

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relevant and pertinent to the subject of the inquiry and was supported by affidavits; and an order suspending such attorney from office for six months was reversed.

Argued April 9, 1917. Appeal, No. 287, Jan. T., 1916, by respondent, from order of C. P. Luzerne Co., May T., 1916, No. 281, striking defendant's name from record as an attorney for a period of six months in re Investigation of certain statements alleged to have been made by Paul J. Sherwood, Esq., a member of the Luzerne County Bar. Before BROWN, C. J., MESTREZAT, POTTER, FRAZER and WALLING, JJ. Reversed.

Rule to show cause why respondent should not be removed from the office of attorney for breach of fidelity to the court and misbehavior in office. Before BARBER, P. J., specially presiding.

The facts appear by the opinion of the Supreme Court.

The lower court made an order suspending respondent from office for a period of six months. Respondent appealed.

Error assigned, among others, was the order of the court.

James Scarlet and *R. W. Archbald*, for appellant.—It is the motive that makes an invasion of the judges' rights a breach of professional fidelity: *Ex parte Steinman & Hensel*, 95 Pa. 220.

The words alleged to have been spoken by the respondent were privileged: *Hoar v. Ward*, 3d Met. (Mass.) 193; *Detroit City v. Detroit City Ry. Co.*, 54 Fed. Repr. 1; *Ellison v. Louisville & N. R. Co.*, 112 Fed. Repr. 805; *Johnson v. State*, 112 S. W. Repr. 143; *Moses v. Julian*, 45 N. H. 52.

Evan C. Jones, amicus curiæ, with him *John R. Halsey*, *Anthony L. Williams* and *Edwin Shortz, Sr.*, Board of Censors Law and Library Association, for appellee.—

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Courts have jurisdiction and power upon their own motion without formal complaint or petition, in a proper case to strike the name of an attorney from the roll, provided he has had reasonable notice and opportunity to be heard: *Ex parte Steinman and Hensel*, 95 Pa. 220; *Smith's App.*, 179 Pa. 14; *Scouten's App.*, 186 Pa. 270.

OPINION BY MR. CHIEF JUSTICE BROWN, January 7, 1918:

In June, 1914, Henry W. Stough, a citizen of the State of Illinois, and a peripatetic evangelist, conducted a series of largely-attended public meetings in the City of Hazleton, this State. In the course of his addresses or sermons he referred to four residents of the city in terms regarded by them as slanderous, and each one of them brought an action against him in the court below. In March, 1916, he presented his petitions to the United States District Court for the Middle District of Pennsylvania, setting forth that, from prejudice and local influence in favor of each of the plaintiffs in said actions, and adverse to him, he would not be able to obtain justice in the court below, or any other court in the State to which he might, under its laws, have a right to remove the said causes of action, on account of said prejudice and local influence; and the prayer of each petition was for an order removing the cause to which it referred from the Court of Common Pleas to the Federal court. These petitions were presented under the provisions of Section 28 of the Judicial Code of the United States, Act of March 3, 1911, c. 231, 36 Stat. at L. 1094, which are in part as follows: "Any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said District court that, from prejudice and local influence, he will not be able to obtain justice in such State court." "And at any time before the trial of any suit, which is now pending in any District court, or

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may hereafter be entered therein, and which has been removed to said court from a State court, on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice, in said State court, the District court shall, upon the application, examine into the truth of said affidavit, and the grounds thereof; and unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice from said State court, it shall cause the same to be remanded thereto." Writs of certiorari were allowed by the United States District Court, and the records of the four actions brought against Stough in the Court of Common Pleas of Luzerne County were removed to the Federal court. After such removal and before trial of the causes, counsel for three of the plaintiffs moved the court to remand them to the Court of Common Pleas. Upon argument of these motions before the United States District Court, Paul J. Sherwood, Esq., a member of the Luzerne County bar, who had appeared in the local court as counsel for Stough, was alleged to have said, "the five judges of the Luzerne court are so prejudiced that Stough could not get a fair trial in our courts." This alleged statement having been brought to the attention of the judges of the Court of Common Pleas of Luzerne County, Evan C. Jones, Esq., a member of the bar of that court, was appointed *amicus curiæ* to make investigation and report. He reported that, upon information given him by three reputable persons, worthy of credence, the said Sherwood, who appeared as counsel for Stough in the United States court, had stated on March 27, 1916, during the argument upon the motions to remand, before Hon. C. B. Witmer, judge of the United States court, in substance, "The five judges of the Luzerne court are so prejudiced that Stough could not get a fair trial in our courts." Thereupon a rule was granted on the appellant to show cause why he should not be removed from his office of attorney, for

breach of fidelity to the court and for misbehavior in his said office. An answer was filed to this rule and much testimony was taken before the President Judge of the Fifty-sixth Judicial District, specially presiding. After a patient hearing he found that the appellant had used the language upon which the rule to show cause was granted, and adjudged him guilty of breach of fidelity to the court and of misbehavior in his office of attorney. This was followed by an order suspending him from such office for a period of six months. From that order there has come his appeal.

The misconduct charged against the appellant, and for which he was disciplined, was not for contempt of the court below, committed in another court, and the question before us is not as to jurisdiction over alleged contempt there committed. He was charged and found guilty of a breach of fidelity to the court below and of misbehavior in his office as one of its attorneys. If he was guilty of either or both of these offenses, it had undoubted jurisdiction of the proceeding instituted against him, no matter where he offended. When he presented himself to the court below for admission to the bar, he made solemn oath, as required by the statute, that he would behave himself in his office as attorney within it with all due fidelity to it. This obligation was upon him in the United States court when he uttered the words which led to the charges against him. He was there and then acting as an attorney-at-law, in connection with proceedings which had been instituted in the Court of Common Pleas of Luzerne County, and in which he had appeared for the defendant; and the correct conclusion of the learned judge below was that it was impossible to sever his conduct from his professional relation to the court in which the suits against Stough had been brought. "All of the acts of the respondent which gave rise to the charges against him, were committed in conducting his legal business as an attorney..... From the very nature of his office, and its relation to the

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public and the court, a lawyer who enters at his own solicitation by the front door subjects himself to ejection by the back one, if he do not 'behave himself well': Smith's App., 179 Pa. 14; and "no question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court": Ex parte Steinman and Hensel, 95 Pa. 220. "It is unimportant as affecting the right and duty of the court in the premises where the misconduct of the attorney occurs": FELL, C. J., in *In re Graffius*, 241 Pa. 222. "A state court may therefore disbar one of its attorneys for misconduct committed in a Federal court, or in any other state": *People v. Green*, 9 Colo. 527; *Thornton on Attorneys*, Sec. 770. The jurisdiction of the court being clear, the only question for consideration now is whether what was charged and clearly proven against the respondent constituted a breach of fidelity to it and misbehavior by him in his office as one of its attorneys.

By Section 2, Article III, of the Constitution of the United States, the jurisdiction of the Federal courts is extended to all controversies in law and equity between citizens of different states. The manifest reason for this provision was apprehension by the framers of the Constitution that prejudice or local influence might operate in the courts of one state against a citizen of another, and its purpose is to secure for controversies between citizens of different states a tribunal independent of local influences and surroundings, whether the questions for determination are of fact or law. In pursuance of it the Act of Congress of March 3, 1911, was passed, providing that a defendant in a suit in a state court may remove it to the proper Federal court at any time before the trial thereof, if it shall appear to said court that he will not, from prejudice and local influence, be able to obtain justice in the state court. The right of removal to a Federal court, on the ground of local prejudice, is not confined to prejudices which may affect a jury, but extends to those which may influence a judge: *City of*

Detroit v. Detroit City Ry. Co., 54 Fed. Rep. 1; Ellison v. Louisville & N. R. Co., 112 Fed. Rep. 805.

The learned judge below correctly said: "The single issue in this case is whether the respondent made use of certain words in his argument in the District court." If he was to be adjudged guilty of misbehavior in his office as an attorney, it was because he there used those words. However unseemly his conduct may have been in and out of court in connection with his answer to the rule taken upon him, the sole questions before the court were, Did he use, in the Federal court, the words charged against him, and, if he did, was his utterance of them misbehavior in his office as an attorney? Nothing else was to be considered by the court below, and there is nothing else for our consideration. It found, upon all sufficient evidence, that the appellant had, on March 27, 1916, said in the District Court of the United States at Scranton, "The five judges of the Luzerne court are so prejudiced that Stough could not get a fair trial in our courts." Were these words, under the circumstances, privileged? If they were, the appellant was not technically guilty of misbehavior in his office as an attorney. His bad taste in using them is not the question in the case. His professional brethren may justly regard him guilty of that offense, but his loss of their respect is the only penalty for it, if the language used was privileged under the law.

The test of the appellant's privilege is not whether the words spoken were true, but whether they were spoken in the course of a judicial proceeding and were relevant or pertinent to the subject or cause of the inquiry: *Hoar v. Wood*, 3 Met. 193. The right of Stough to remove to the United States courts the suits brought against him in the Common Pleas of Luzerne County was purely statutory, and the condition of the act of congress upon which he could remove them was that he should make it appear to the Federal court that, from prejudice and local influence, he would not be able to obtain justice in

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the State court. In his petitions to the United States court, asking for the removal of the suits to it, he averred that, from prejudice and local influence in favor of the plaintiffs and adverse to him, he would not be able to obtain justice in the courts of Luzerne County, or in any other State court to which he might, under the laws of the State, have a right to remove the same on account of such prejudice or local influence. This petition was supported by two affidavits, and the suits were removed to the Federal court. Subsequently the respective plaintiffs moved to remand them to the State court, and, in opposition to this, affidavits of residents of Luzerne County were filed, with the court's permission, charging such prejudice and local influence against the defendant as would make it impossible for him to obtain justice in the State court; and these affidavits, in effect, charged that the prejudice or local influence extended to the judges of the Court of Common Pleas. This was the situation in the Federal court when the appellant used the language for which the court below found him guilty of misbehavior in his office as an attorney. As already stated, prejudice and local influence, within the contemplation of the act of congress, are such as affect judges as well as jurors, and we are, therefore, constrained to hold that, in view of the averment in the petition to remove the suits to the Federal court, and of what appeared in the affidavits filed in opposition to the motions to remand them, the appellant was privileged in saying what he did in resisting the effort to have the suits against his client remanded. He was charging, with affidavits apparently supporting him, what the act of congress required his client to show, if the suits were to remain in the United States court. What he said was spoken in the course of a judicial proceeding, and was relevant and pertinent to the subject or cause of the inquiry. The rule taken against him was for certain language used by him in the Federal court, and for nothing else, and, on his appeal from the order suspending him

from his office as an attorney, we must confine ourselves to it. Being of opinion, for the reason just given, that the appellant was within his privilege in making a disrespectful criticism of the learned and upright court below, the order from which he has appealed must be reversed.

Decree reversed, the costs below and on this appeal to be paid by the County of Luzerne.

Clark v. Butler Junction Coal Company, Appellant.

Negligence—Master and servant—Mines and mining—Damages—Measure of damages—Evidence—Character of treatment for injuries—Cross-examination of plaintiff.

1. In an action for personal injuries, where it appears that at the time of the accident, plaintiff was engaged in an occupation yielding him a low wage, it is nevertheless competent for him to prove that he is skilled at other occupations paying a higher wage, especially where it appears that his inability to pursue a more profitable occupation at the time of the injury was due to a temporary condition in the financial and industrial world.

2. In such case, however, it was error to permit the plaintiff to express a guess as to what wages he could earn at the more profitable occupation, in the absence of evidence as to the general wage scale for such labor or that the witness was distinguished by superior capacity over others in his class of employment.

3. Where in an action for personal injuries the plaintiff testifies as to the extent and character of his injuries and the pain and suffering he endured, the defendant is entitled to cross-examine him as to what he did or failed to do in order to obtain relief and improvement, and it is error for the court to refuse to allow plaintiff to be cross-examined with respect to the medical and surgical treatment he received, if any, immediately following the injury.

4. Where in an action against a coal mining company the negligence charged was in allowing an uncovered hole to be in the path of an employee whose daily task was to push loaded cars over the hole, it was no part of the plaintiff's case to show that the maintenance of such hole was exceptional, and out of the usual custom

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of the operation of coal mines, and an objection to the admission of such evidence, should have been sustained.

Argued Sept. 26, 1917. Appeal, No. 81, Oct. T., 1917, by defendant, from judgment of C. P. Armstrong Co., March T., 1916, No. 49, on verdict for plaintiff, in case of John J. Clark v. Butler Junction Coal Company, a corporation under the laws of Pennsylvania. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and FRAZER, JJ. Reversed.

Trespass to recover damages for personal injuries. Before KING, P. J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$3,980 and judgment thereon. Defendant appealed.

Errors assigned were rulings on evidence and instructions to the jury.

H. A. Heilman, with him *F. C. Jones*, for appellant, cited: *Quigley v. P. R. R. Co.*, 210 Pa. 162; *Com. to use v. Julius et al.*, 173 Pa. 322; *Honesdale Glass Co. v. Storms*, 125 Pa. 268; *Bassler v. Niesly*, 2 Ser. & R. 352; *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. 625; *McGeehan v. Hughes*, 217 Pa. 121.

Harry C. Golden, with him *C. E. Harrington*, for appellee, cited: *Kuhn v. Ligonier Valley R. R. Co.*, 255 Pa. 445; *Burns v. Vesta Coal Co.*, 223 Pa. 473; *Solt v. Williamsport Radiator Co.*, 231 Pa. 585; *Hollis v. Widener*, 221 Pa. 72; *Smiers v. Ford Collieries Co.*, 252 Pa. 415; *Martin v. Atlantic Transport Co.*, 237 Pa. 15; *Mack v. Pittsburgh Rys. Co.*, 247 Pa. 598.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

The plaintiff, a man fifty-six years of age, had been a coal miner for upwards of thirty years. When injured

he was in the employ of the defendant company and had been for about four months previous, not however as a miner, but as a helper at the surface of the mine. His task was to push from the pit mouth the loaded cars as they came from the mine below over a short track of railroad into what is spoken of as the check house, where the cars were placed on an incline and thence carried to a tippie below. While so engaged, between the hours of six and seven in the morning of January 1, 1915, he was injured by stepping into a hole, unobserved by him, between the tracks of the road over which he was pushing several cars to the check house. In this hole, about twenty-eight inches in length by twelve in width, there was machinery by which the descent of the cars on the incline was controlled, consisting of a revolving wheel and drum over which a rope or cable passed, which it was the duty of the plaintiff to attach to the cars before they were placed on the incline. The hole was uncovered and without guard. The result of plaintiff's misstep into it was, that he was seriously injured in his right knee, so he charges. For the service he was rendering the defendant company he was receiving a wage of two dollars per day. He recovered a verdict of \$3,980.00, and the appeal is from the judgment thereon.

The errors assigned are fourteen in number. They may be compressed within narrower limit. Fully a half dozen of the assignments complain of undue latitude allowed in the testimony of the plaintiff himself when on the stand, special reference being to so much of the testimony as related to the wages he had earned when engaged as a coal miner four months before his injury; to his testimony that his purpose at the time of the injury was to resume work as a miner when opportunity afforded; to his explanation of the fact that he was working for a much less wage when injured than that he was accustomed to receive as miner, and that but for the injury he received, he could readily earn at mining from six to eight dollars a day. These assignments rest on tech-

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nical grounds, and while several of them are not without merit, we are not convinced that the error they point to was substantial, or that prejudice resulted to the defendant in consequence of the admission of the evidence complained of. One element of damages in cases of this character is loss of earning power, and one way—sometimes the only one—of measuring such damage, is by the difference in wage; but care must be observed to distinguish between the thing itself which is the basis of recovery and the method adopted for its measurement. This plaintiff, although he had been a miner of coal for more than thirty years, at the time of his accident, and during the whole period in which he was so employed by the defendant, was receiving but two dollars per day. It was perfectly competent for him to show that he regarded his employment of pushing cars as but temporary; that the coal company that had employed him as miner had suspended operation because of market conditions, and that it was because of this suspension he engaged with the defendant company for such work as yielded him a much less wage than he had been accustomed to receive, and that he contemplated returning to the work of mining when market conditions changed. It was not pretended that his change of employment was due to any decline in his earning capacity as a miner. Under these circumstances it would have been manifestly unfair to use the lower wage he received from the defendant company as a basis for estimating his loss in earning capacity. While this is true, it was, nevertheless, error to allow the examination of the witness on this branch of the case to proceed as it did, against the objection of the defendant. For instance, this question was asked him: "If you were able to take such position at the present time, and work in the same way that you worked before the accident in a coal mine, what would you be able to make at the present time?" His answer was: "I could make six to seven dollars a day." There was but one way of proving this, and that was by proving the general wage scale for such

labor, in the absence of any testimony that the witness was distinguished by superior capacity over the ordinary miner. As asked and answered, the jury was given no other basis for determining this most important question than a mere conjecture of the plaintiff. It is complained that as thus presented, the testimony was calculated to swell unduly the damages allowed for loss of earning capacity. The fourth assignment of error is sustained.

Another assignment complains of the refusal of the court to allow on cross-examination the plaintiff to be inquired of with respect to the medical and surgical treatment he received, if any, immediately following upon his injury. Plaintiff was injured January 1, 1915. He testified that he first consulted a physician during the following June, who simply advised the use of a rubber supporter, which he thereafter did use, and that he exhibited his injured limb to no other professional person for a year thereafter, and then not for advice or treatment, but in the preparation of his case for trial. Counsel for defendant proposed to ask the witness where he resided at the time of his accident, whether or not he had a family physician, and whether he had consulted him as to his injury at any time. This was objected to on the ground of immateriality and the objection was sustained. The question was entirely proper. The plaintiff having testified as to the extent and character of his injuries, the pain and suffering he endured, the defendant had a right on cross-examination to get from him the fullest particulars, both as to what he did and what he failed to do to obtain relief and improvement. This assignment is sustained.

Still another complains of the admission of the testimony of the two witnesses, Dinninger and Troup, as to the method here adopted of maintaining an uncovered hole such as this was, between the rails of a track on which the loaded cars were pushed from the mouth of the pit to the check house, whether the same was customary and usual in like places of work. This objection should

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have prevailed. The negligence charged was allowing such an uncovered hole as this was shown to be, in the path of the employee whose daily task was to push loaded cars over it. It was no part of plaintiff's case to show it to be exceptional, out of the usual custom in the operation of coal mines. The party charging negligence does not show it by showing that the appliance which caused the injury was not in common use: *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. 625. It is proper for the defendant in defending against the charge of negligence to show, if it can, that it was the custom to maintain such hole in the condition described, whether from necessity or otherwise; but "the evidence should not in the first instance be admitted on behalf of the plaintiff unless it tends to show that the method pursued was not only unusual, but more dangerous in itself than the ordinary one": *Cunningham v. Bridge Works*, *supra*. This assignment is also sustained.

The affirmance of plaintiff's second point as to the applicability of the Act of June 2, 1913, P. L. 396, to this action, as qualified by the court, was without prejudice to the defendant. Without this, it is so unrelated to anything suggested in appellant's statement of question involved that it calls for no consideration here, and this assignment of error is therefore dismissed: *Smith v. The Lehigh V. R. R. Co.*, 232 Pa. 456.

The judgment is reversed and a *venire facias de novo* is awarded.

Brown v. Kittanning Clay Products Company, Appellant.

Negligence—Master and servant—Death of workman—Parties defendant—Corporations—Identity of master—Evidence—Hearsay—Declaration of agent—Charge of court.

1. In an action to recover damages for the death of plaintiff's husband, where it appeared that deceased was in the employ of a

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clay products company and that he was killed while at work, by the fall of a derrick constructed for the purpose of cleaning out a gas well owned by and located upon the property of an oil company, that the two companies had certain officers in common and that the oil company furnished natural gas used by the products company in the operation of its plant, it was reversible error for the court to charge that the defendant would be liable if the jury found that the two corporations were in fact one and the same, where there was no evidence to support the charge.

2. Hearsay evidence of a declaration on admission by an agent made after the accident is inadmissible.

3. Where it appeared that the superintendent of a defendant corporation was dead at the time of trial, it was not proper to permit witnesses to testify as to declarations made to them by such superintendent after the accident, to the effect that he did not want plaintiff's husband to go to a well, but he finally let him go and that in the end he had plainly told deceased to go to the well.

4. Had there been express testimony by some one who had actually heard the order alleged to have been given by the superintendent to the deceased to report at the well, and had the defendant denied the giving of such order, the alleged declaration might have been admitted in rebuttal.

5. Where it appeared that, on the day of the accident, defendant's superintendent, with the knowledge and consent of defendant, permitted deceased and other workmen under his control to work about the wells of the oil company, it was for the jury to determine whether, in view of the close relations existing between the two companies, the deceased was working for the products company at the time of the injury, or whether, as contended by defendant, he was working for the oil company, or whether he was a mere volunteer.

Supreme Court, Practice—Assignments of error—Admission of evidence—Inadequate objection.

6. Where evidence is objected to on inadequate grounds and admitted, the Supreme Court cannot reverse on adequate grounds urged on appeal but not suggested below.

Argued Sept. 27, 1917. Appeal, No. 2, Oct. T., 1917, by defendant, from judgment of C. P. Armstrong Co., Dec. T., 1914, No. 116, on verdict for plaintiff, in case of Annie E. Brown v. Kittanning Clay Products Company. Before MESTREZAT, POTTEE, STEWART, MOSCHZISKE and FRAZER, JJ. Reversed.

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Trespass to recover damages for the death of plaintiff's husband. Before KING, P. J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$5,000 and judgment thereon. Defendant appealed.

Errors assigned were instructions to the jury.

Francis R. Harbison, with him *Charles F. Patterson*, for appellant.

C. E. Harrington, with him *H. A. Heilman*, for appellee.

OPINION BY MR. JUSTICE MOSCHZISKEE, January 7, 1918:

On December 13, 1913, William Brown was killed by the falling of a derrick, constructed for the purpose of cleaning out a gas well; his widow sued to recover damages, alleging that her husband's death was due to the negligence of his employer, the Kittanning Clay Products Company, a corporation; judgment was entered on a verdict in her favor, and the defendant has appealed.

In course of the presentation of plaintiff's case, it appeared that the well in question belonged to and was located upon the property of another corporation, named the Foster Oil and Gas Company, and the trial judge charged that defendant would be liable if the jury should find that the Kittanning Clay Products Company and the Foster Oil and Gas Company were, "in effect, one and the same"; this instruction is assigned as error. While, in certain instances, the same men held similar offices in each of these corporations, and the oil company furnished some of the natural gas used by the products company in the operation of the latter's plant, yet there is no sufficient evidence upon the record to justify a finding that they were, in any sense, "one and the same" company; for this reason, since, under the instruction-

complained of, the jury may have based their verdict on such a finding, the fourth assignment, which calls attention to this part of the charge, will have to be sustained.

Testimony was admitted on behalf of the plaintiff, under objection and exception, that Frank Foster, the superintendent of defendant company, who was dead at the time of the trial, had told one of plaintiff's witnesses, three days after the accident, that he, Foster, "didn't want Mr. Brown [plaintiff's husband] to go to that well," but that he "finally let Brown go" there; and, in the end, the witness said plainly Foster had declared to him that he had "told Brown to go to the well." It is contended by defendant that the admission of this testimony was clear reversible error, and that, whether or not this be true, the evidence is insufficient to support the verdict. On the other hand, plaintiff contends that, since at the trial defendant's objection was stated upon the narrow and inadequate ground that Frank Foster was dead, it is too late now to insist upon broader reasons for its exclusion; and, being in, the evidence was proper for consideration by the jury.

The testimony under consideration was, at the most, but hearsay evidence of a declaration or admission by an agent, made after the accident; therefore, it was inadmissible: *Scheel v. Shaw*, 252 Pa. 451, 461; *Monongahela Water Co. v. Stewartson et ux.*, 96 Pa. 436, 439; *Bigley v. Williams*, 80 Pa. 107, 116; *Fawcett v. Bigley*, 59 Pa. 411, 413; *Giberson v. Patterson Mills Co.*, 174 Pa. 369, 372. Of course, had there been express testimony by some one who had actually heard the order alleged to have been given by Foster to Brown, to report at the oil well, and had the giving of such order been denied by defendant, then the alleged declaration of Foster might properly have been admitted in rebuttal; but no such record is before us. While, under the limited objection entered by counsel for defendant, we cannot convict the trial judge of error in admitting this hearsay evidence, yet, on a retrial of the case, if the testimony in

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question be again offered, in the same way and under similar circumstances, a proper objection thereto should prevail.

Perhaps, if the hearsay and incompetent testimony we have been discussing were the only evidence upon the issue as to whether or not Brown was put to work on the well by defendant's superintendent, that being a controlling point in the case, the proofs might be held insufficient to support the verdict for plaintiff (*Reeve v. Leibrandt Plumbing Co.*, 168 Ill. App. 541; *Equitable Mortgage Co. v. Watson*, 119 Ga. 280, 283, 287; *Eastlick v. Southern Ry. Co.*, 116 Ga. 48, 49; *Dwyer v. Dwyer*, 26 Missouri App. 647, 652; but, in this connection, see also *Lockett v. Reighard*, 248 Pa. 24, 28), and defendant would be entitled to judgment n. o. v. There was other competent testimony, however, to the effect that, on the day of the accident, Mr. Foster, who had full charge of defendant's workmen, accompanied Mr. Brown to the place of the accident, where the latter helped in the work around the derrick; that employees of the products company, for some time prior thereto, had been in the habit of rendering assistance in connection with the wells of the oil company; and that this was done with the knowledge and consent of their employer, the defendant. Under these circumstances, considering the close relations existing between the two companies, had there been no other evidence in plaintiff's case than that of the facts just referred to, and had the objectionable testimony concerning the alleged declaration of Foster been excluded, still it would have been for the jury to determine whether or not, at the time of his injury, Brown was, in fact, acting for his original employer, the products company. If Brown was not a mere volunteer, as contended by appellant, and was unaware of any actual change of employers, in other words, if the jury should find that, as between him and the products company, he was acting for the latter, then, albeit the well belonged to the oil company, the present defendant would be liable:

Smith v. York Rys. Co., 237 Pa. 280, 283. Therefore, the learned court below did not err in refusing to enter judgment notwithstanding the verdict.

The fourth assignment, covering the matter first passed upon in this opinion, is sustained, and the judgment is reversed with a venire facias de novo.

Commonwealth v. Delfino, Appellant.

Murder—First degree—Lying in wait—Evidence—Adverse witness—Cross-examination—Evidence of witness's previous statement—Threats—Ill feeling—Remoteness—Admissibility—Motive—Scope of cross-examination of defendant—Improper remarks of district attorney—Failure to object—Dying declaration—Conflicting declarations—Defenses—Alibi—New trial—After-discovered evidence—Cumulative evidence.

1. Where on the trial of a homicide case one of the Commonwealth's witnesses testifies at variance to his previous statement, it is not error to permit the district attorney to cross-examine the witness as to such statement, or to offer testimony as to what his previous statement was, for the purpose of neutralizing the effect of his testimony. The allowance of such permission is largely discretionary with the trial judge.

2. The remoteness of threats may greatly impair their probative force, but as a rule it does not affect their admissibility.

3. On the trial of an indictment for murder it is competent for the Commonwealth to show that the defendant had formerly boarded with deceased and during such time there had been trouble between them because of which the deceased had ordered the defendant from his home, although such occurrence was two and a half years previous to the homicide. The remoteness goes to the weight rather than the competency of such evidence.

4. Great latitude is permissible in the cross-examination of a defendant.

5. Where a defendant on trial for murder testifies that he had no motive or reason for killing the deceased, the district attorney may ask him questions tending to prove motive, and in that connection to attempt to show that defendant blamed deceased for a wound inflicted upon defendant by a third party, and defendant cannot complain because such examination failed in its purpose,

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where it does not appear that the district attorney asked the questions in bad faith or that defendant was prejudiced thereby.

6. It was improper for the district attorney to remark during such examination, "We believe now if this man (the defendant) would answer the questions truthfully we could show that that was the motive for this homicide," but where no objection or exception was taken to such remark at the time, it cannot be made the basis of an assignment of error.

7. The fact that the court in its charge inadvertently stated that a certain witness testified to certain declarations of the victim, where substantially such testimony had been given by other witnesses but not by the witness referred to, is not reversible error where the court's attention was not called to the mistake at the time.

8. The allowance or refusal of a new trial in a homicide case is so clearly a matter within the discretion of the trial court that its action will not be reviewed in the absence of clear error.

9. A motion for a new trial in a homicide case, on the ground of after-discovered evidence, was properly refused where such evidence was largely cumulative and with due diligence might have been discovered before the trial.

10. The fact that the trial judge, in passing upon the motion for a new trial, considered the affidavit of a witness in explanation of his deposition, affords no ground for reversing the judgment.

11. After declarations have been admitted as dying declarations their weight and credibility are for the jury, and where such declarations are contradictory with each other it is the duty of the jury to weigh them and determine which, if any, are to be believed.

12. On the trial of an indictment for murder the evidence tended to show that defendant stepped from behind an abutment of a railroad bridge and fired two shots at deceased, that deceased ran a short distance and made statements charging defendant with the crime for which he was arrested half an hour thereafter near the scene of the shooting. There was evidence that defendant saw deceased shortly before the latter started toward his home, to reach which he would pass under the bridge, and there was further evidence that defendant was seen going toward the bridge shortly before the shooting. On the morning after the shooting a revolver containing three 38-calibre cartridges and two empty shells was found near the railroad tracks sixty rods from the bridge, and on the following day an empty cartridge case was found in the defendant's room with name and number corresponding to that on the cartridges found in the revolver. There was evidence that ill-feeling existed between defendant and deceased prior to the shooting. *Held*, there was sufficient evidence that the murder was committed

by lying in wait, and a verdict of guilty of murder of the first degree will be sustained.

13. In such case the court did not err in charging that "the Commonwealth has shown that this cartridge box was found in the room of the defendant," the word "shown" used in such connection meaning "pointed out or made known by evidence," and not necessarily that the facts referred to had been established.

14. In a homicide case the fact that defendant on the afternoon of the day of the homicide withdrew from the local bank his entire deposit amounting to \$200, was a circumstance tending to show preparation for flight and was properly admitted.

15. Where the defense was an alibi attempted to be established by four persons in a store, who stated that defendant was in the store all evening (with the exception of a period of five minutes) until arrested, and it appeared that it would have taken from fifteen to twenty-five minutes to go to the scene of the shooting and return, but such witnesses were busy attending store and estimates made by some of them indicated that what seemed like four or five minutes was in reality twelve to twenty, the court properly charged that if the defendant was gone long enough from the store to have perpetrated the crime and returned, referring to such time as fifteen to twenty minutes, the jury might find him guilty, and further that "if you find from the weight of the testimony, from the preponderance of the evidence, that he (defendant) was not at the scene of the crime at the time of the killing, you must find a verdict of not guilty."

Argued Oct. 8, 1917. Appeal, No. 199, Jan. T., 1917, by defendant, from sentence of O. & T. Lackawanna Co., Oct. Sessions, 1916, No. 1, on verdict of guilty of murder of the first degree in case of Commonwealth of Pennsylvania v. Dominick Delfino. Before MESTREZAT, STEWART, MOSCHISKER, FRAZER and WALLING, JJ. Affirmed.

Indictment for murder. Before MOSER, P. J., specially presiding.

The facts appear by the opinion of the Supreme Court.

Verdict of guilty of murder of the first degree on which sentence of death was passed. Defendant appealed.

Errors assigned, among others, were various rulings on evidence, alleged improper remarks by the district attorney and the charge of the court.

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Arguments.

Clarence Balentine, with him *E. T. Philbin* and *H. L. Taylor*, for appellant.—The district attorney should not have been permitted to cross-examine one of the Commonwealth's witnesses.

The court improperly charged on the question of alibi: *Commonwealth v. Andrews*, 234 Pa. 597; *Turner v. Commonwealth*, 86 Pa. 54.

The court erred in quoting the defendant as having testified to facts he did not testify to.

George W. Maxey, District Attorney, for appellee.—The district attorney is entitled to ask leading questions if the Commonwealth's witnesses should appear to be adverse: *Commonwealth v. Wickett*, 20 Pa. Superior Ct. 350; *Gantt v. Cox & Sons Co.*, 199 Pa. 208.

Evidence that defendant withdrew his entire bank deposits on the day of the shooting is admissible: *Bradshaw v. The State of Nebraska*, 17 Neb. 147; *Marion v. The State of Nebraska*, 16 Neb. 349; *Rudy v. Commonwealth*, 128 Pa. 500; *State of Iowa v. Hossack*, 116 Iowa 194; *The People v. Willett*, 105 Mich. 110; *Gaines v. The Commonwealth*, 50 Pa. 319; *Boyle v. The State*, 105 Ind. 469; *The People of the State of N. Y. v. Mullen*, 163 N. Y. 312; *Disque v. The State*, 49 N. J. L. 249; *United States v. Mullaney*, 32 Fed. 370.

The court properly charged on the question of alibi: *Commonwealth v. Andrews*, 234 Pa. 597; *Briceland v. The Commonwealth*, 74 Pa. 463.

The fact that the court charged that the Commonwealth had "shown" that the cartridge box had been found in defendant's room did not treat the fact as being established and was not error: *Commonwealth v. Razmus*, 210 Pa. 609.

The verdict of guilty of murder of the first degree was amply supported by the evidence: *Grant v. The Commonwealth*, 71 Pa. 495; *Commonwealth v. Morrison*, 193 Pa. 613; *Commonwealth v. Danz*, 211 Pa. 507.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

This is an appeal by defendant from the judgment on conviction of murder of the first degree.

On the evening of April 25, 1916, Daimetro Morobito was shot and killed at the subway where Wayne street passes under the tracks of the Delaware and Hudson Railroad, in Archbald, Lackawanna County. The assassin apparently stepped from behind an abutment and fired two shots, one taking effect in Morobito's breast and the other in his neck. He made an outcry and ran back along the street a short distance where he fell and was carried into a barber shop, and later to a hospital where he died early the next morning. The shooting occurred at 8:15 p. m., and the defendant was arrested about one-half hour thereafter on statements of Morobito charging him with the crime. The arrest was made in Pitea's store about 950 feet from the subway.

We have carefully examined each of the thirteen assignments of error and in our opinion none of them can be sustained. On the allegation that one of the Commonwealth's witnesses testified at variance to his previous statement to the district attorney, that officer was permitted to cross-examine the witness as to such statements. This was a matter largely in the discretion of the trial judge and his allowance of such examination was not error: *Gantt v. Cox & Sons Co.*, 199 Pa. 208; *Commonwealth v. Deitrick*, 221 Pa. 7. That the defendant, on the afternoon of the day of the homicide, withdrew from the local bank his entire deposit amounting to \$200, which with other money he had on his person when arrested, was a circumstance tending to show preparation for flight and as such was properly admitted. It was competent for the Commonwealth to show that defendant had formerly boarded with the deceased at when there had been trouble between them, by reason of which the deceased had ordered the defendant from his home, although such occurrence was two and a half years previous to the homicide. The remoteness

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goes to the weight rather than the competency of such evidence: *Sayres v. Commonwealth*, 88 Pa. 291; *Commonwealth v. Salyards*, 158 Pa. 501. The remoteness of threats may greatly impair their probative force, but as a rule it does not affect their admissibility in evidence: 21 Cyc. 892; 13 Ruling Case Law, page 925. Besides, here there was some evidence tending to show ill feeling between the parties at a more recent period.

Mr. Mellow, a witness called by the Commonwealth, testified that the two men were at his hotel early that evening and that Morobito left first. The district attorney alleged surprise at this answer, and to neutralize the same was permitted to offer testimony to the effect that Mr. Mellow had previously stated that he thought the defendant left first. This was within the trial court's discretion: *Commonwealth v. Wickett*, 20 Pa. Superior Ct. 350. And see *Roscoe's Criminal Evidence* (8th Ed.), page 162. In any event, it became unimportant for defendant expressly testified that he left Mellow's place before Morobito did. Defendant having testified in chief that he had no motive or reason to kill Morobito, it was competent for the district attorney to ask him such questions as might tend to prove motive, and in that connection to try to show that he blamed the deceased for a wound which had been inflicted upon defendant by a third party a short time before the homicide. The cross-examination failed of its purpose, but it does not appear that the district attorney asked the questions in bad faith or that defendant was prejudiced thereby. Great latitude is permissible in the cross-examination of a defendant: *Commonwealth v. Racco*, 225 Pa. 113; *Commonwealth v. Bubnis*, 197 Pa. 542; *Commonwealth v. Fitzpatrick*, 1 Pa. Superior Ct. 518; *Commonwealth v. Williams*, 41 Pa. Superior Ct. 326. During this examination the district attorney stated that "We believe now if this man [the defendant] would answer the questions truthfully, we could show that that was the motive for this homicide." This was an im-

proper remark, but, as there was no objection or exception taken thereto, it cannot be made the basis of an assignment of error: Commonwealth v. Polichinus, 229 Pa. 311. True, objections were made and exceptions taken to certain questions asked upon that branch of the cross-examination, but nothing was said as to the remark of the district attorney.

The sixth and seventh assignments of error are based upon certain statements in the charge of the court, wherein reference is made to the contention and theory of the Commonwealth. But that was not error, as such contention and theory found some support in the evidence. The fact that the defendant saw the deceased shortly before the latter started down Wayne street in the direction of his home, to reach which he would pass the subway, and where according to his declarations the defendant stepped from behind the abutment and shot him, tends to support the contention that the murder was perpetrated by lying in wait. And the evidence that defendant was seen shortly before the homicide near the west end of the foot bridge at Salem street, above Wayne street, and said he was going home, which would take him over that bridge, tends to support the theory that he crossed the river there, and, in connection with the evidence that he was at the subway, tends to support the theory that he came there by walking down the railroad track.

In addition to his general denial, defendant set up an alibi and submitted his own evidence and that of four other witnesses to the effect that he had been continuously in the store where arrested since before seven o'clock, except at one time not exceeding five minutes when he was called to the door by the chief of police. To go and commit the crime and return in the manner the Commonwealth contends he did would take under ordinary circumstances about fifteen minutes, as he would travel some four-fifths of a mile. However, the witnesses to the alibi were busy waiting upon customers

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in the store and had no way of fixing the length of time the defendant was absent therefrom, except as an estimate from recollection. And estimates made by some of those witnesses while testifying indicate that what to them seemed four or five minutes was in reality from twelve to twenty minutes. On the question of alibi the court charged, *inter alia*: "If you find from the weight of the testimony, from the preponderance of the evidence, that he was not at the scene of the crime at the time of the killing, you must find a verdict of not guilty." This was a correct statement of the law: *Rudy v. The Commonwealth*, 128 Pa. 500; *Commonwealth v. Andrews*, 234 Pa. 597. The court further said in substance that if the defendant was gone from the store long enough to perpetrate the crime and return, referring to such time as fifteen to twenty minutes, then they might find him guilty. This was a proper explanation and called the attention of the jury to the true test of the alibi.

On the next morning after the shooting, a revolver, containing three 38-calibre cartridges and two empty shells, was found on a box over the wheel of a car standing on a switch about sixty rods up the track from the subway. And two days after the crime was committed an empty cartridge box was found in the defendant's room in his boarding house, with name and number corresponding to that on the cartridge found in the revolver. The court in commenting upon this circumstance said that "The Commonwealth has shown that this cartridge box was found in the room of the defendant." Several witnesses had so testified; but it is urged for defendant that the use of the word "shown" treated the fact as established, while the credibility of the testimony was for the jury. We see no merit in such contention. A proper definition of "shown" as used in the charge would be "pointed out or made known by evidence," and that accords with the dictionaries. The court did not say it had been conclusively shown, and the jury knew that

such fact rested upon oral testimony, and were instructed that, "The facts are to be found from the testimony as you recollect it." The court inadvertently stated that the doctor had testified to certain declarations as made by Morobito shortly after the shooting, when substantially such testimony had been given by other witnesses, but not by the doctor. The court's attention was not called to this mistake at the time and, therefore, it constitutes no ground for reversing the judgment: *Commonwealth v. Razmus*, 210 Pa. 609; *Commonwealth v. Wasson*, 42 Pa. Superior Ct. 38.

The so-called after-discovered evidence, as exhibited in the depositions, was largely cumulative, and with due diligence might have been discovered before the trial. There was no abuse of discretion in refusing to grant a new trial on that ground. Such refusal was so clearly a matter within the discretion of the court below that its action in this respect will not be reviewed in the absence of clear error: *Knickerbocker Ice Co. v. Pa. R. R. Co.*, 253 Pa. 54, 66. And see *Commonwealth v. Garrito*, 222 Pa. 304. That the trial judge in passing upon the motion for a new trial considered the affidavit of a witness in explanation of his deposition affords no ground for reversing the judgment. The case depended to a considerable extent upon dying declarations, the weight of which was for the jury. "All the authorities agree that after the declarations have been admitted as dying declarations their weight and credibility are purely for the determination of the jury": 1 *Ruling Case Law*, page 547. Where such declarations are contradictory to each other, it is the duty of the jury to weigh them and to determine which if either is to be believed: *Wharton's Criminal Evidence* (10th Ed.), page 585. The question of guilt or innocence was for the jury to decide, subject to the approval of the trial judge. If guilty the case presents all the elements of first degree murder. Having considered and passed upon the alleged errors, our duty is performed.

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The assignments of error are all overruled, the judgment is affirmed and the record is remitted for the purpose of execution.

**McMullin et al., Appellants, v. Westinghouse
Estate et al.**

Corporations—Management by creditors—Sale of assets—Purchase by sole stockholder and president—Alleged fraud—Trusts and trustees—Bill in equity—Dismissal.

A bill in equity brought by certain creditors of a corporation sought to impose liability on a decedent's estate on the ground that the decedent's acquisition of the assets of the corporation was a breach of the relationship of trust and confidence in which he stood to complainants, and fraudulent. It appears that deceased had been president of the corporation and owner of all its stock. The corporation was placed in the hands of a receiver and thereafter the creditors perfected a plan, in which complainants joined, under which the receiver was discharged and the creditors controlled the company, naming six of its nine directors, and managed its affairs by an executive committee composed of three of the six directors they had appointed. The company was unable to meet its obligations and its securities were sold at public auction, and were purchased by deceased as the highest bidder. The court found on amply sufficient evidence that after the creditors assumed control deceased took no part in the affairs of the company and had no control over them, and that deceased did not procure the sale to be made and possessed no means to prevent its taking place. *Held*, (1) the mere fact that deceased was the sole stockholder did not render the transaction a fraud, (2) no relationship of trust and confidence existed between deceased and complainants at the time of the sale, and (3) the bill was properly dismissed.

Argued Oct. 15, 1917. Appeal, No. 145, Oct. T., 1917, by plaintiffs, from decree of C. P. Allegheny Co., Jan. T., 1917, No. 1228, in equity, dismissing bill in equity to have defendants declared trustees, in case of M. K. McMullin and Frank H. Clark, Partners, Doing Business as M. K. McMullin & Co., for Themselves and Such Other Creditors of the Security Investment Company (Other

Statement of Facts—Opinion of Court below. [259 Pa. Than the Defendants) Who May Desire to Intervene and Become Parties Plaintiff, The Allegheny Trust Company v. H. H. Westinghouse, Walter D. Uptegraff and Charles A. Terry, Executors of the Estate of George Westinghouse, Deceased; the Security Investment Company, a Corporation of Pennsylvania; George Westinghouse, Jr., and H. H. Westinghouse, Residuary Legatees Under the Last Will and Testament of George Westinghouse, Deceased. Before BROWN, C. J., POTTER, MOSCHZISKE, FRAZER and WALLING, JJ. Affirmed.

Bill in equity to have defendants declared trustees of assets purchased from Security Investment Company.

The facts appear from the following opinion by SHAFER, P. J.:

The bill is by creditors of the Security Investment Company for themselves and other creditors who may desire to join, to have the executors of the decedent decreed to be trustees of the assets of the Security Investment Company for the plaintiffs and certain other creditors of the same class, and require them to pay to the Security Investment Company such sums as may be necessary to discharge the indebtedness owing to the plaintiffs and others.

FINDINGS OF FACT.

First. In the year 1907, George Westinghouse was the owner of a large number of shares of stock in the Westinghouse Airbrake Company, Westinghouse Switch & Signal Company, Westinghouse Electric & Manufacturing Company, Westinghouse Machine Company, and other subsidiary companies, he being the president and director of most of these companies.

Second. At the same time Mr. George Westinghouse was the legal owner of all the stock of the Security Investment Company and was the equitable owner of all the shares of stock held by the directors of the company,

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such shares having been transferred to them by Mr. Westinghouse for the purpose of qualifying them to act as such directors. This company was incorporated by special act of the legislature of Pennsylvania, approved May 29, 1871, by the name of the Southwest Pennsylvania Improvement Company. It was given extensive powers by its charter and its capital stock had at this time been increased to three million dollars, one million of which was preferred stock and the balance common stock, all of which was fully paid.

Third. The Security Investment Company did not engage in any business, except the holding of securities of the various Westinghouse enterprises above mentioned, and in the year 1907 and for a long time before was solvent, having a considerable surplus.

Fourth. In October, 1907, there occurred a severe financial panic by which the market price of various securities of the Westinghouse companies was greatly reduced, and the stocks of these companies owned by the Security Investment Company, and pledged by it in various banks, were likely to be sacrificed. On the 23d of October receivers were appointed for the Security Investment Company, as well as for others of the Westinghouse companies above mentioned, by the United States District Court for the Western District of Pennsylvania.

Fifth. In February, 1908, the receiver, being the Fidelity Title & Trust Company of Pittsburgh, advised all the creditors of the Security Investment Company that after consultation with the principal creditors they had nominated a Creditors' Committee consisting of officers of the various banks in Pittsburgh and in other cities where Westinghouse securities were held by banks and others. The purpose of this committee was to have the creditors join together in protecting the assets of the Security Investment Company and to aid the receivers in the management of its affairs.

Sixth. Almost half of the assets of the Security Investment Company consisted in stocks and bonds of the

Westinghouse Electric & Manufacturing Company which was also in the hands of a receiver. It was deemed necessary for the rehabilitation of the Westinghouse Electric & Manufacturing Company that new capital should be brought into it by issuing additional shares of its capital stock at par, which were to be taken by the owners of stock in proportion to their shares. In order that the Security Investment Company might do its part in this raising of additional capital for the Westinghouse Electric & Manufacturing Company, a plan and agreement for the extension of its debt and the protection of its interest in the Westinghouse Electric & Manufacturing Company was prepared by the Creditors' Committee, a copy of it being printed as Exhibit A of the bill.

Seventh. This plan provided for the issue of new notes to be taken by the creditors of the Security Investment Company who held the electric stock as collateral, to an amount equal to twenty-five per cent. of the face value of the stock so held by them, the stock procured by the proceeds of these notes to be pledged as security for the notes. The plan also provided as to the notes already held by the creditors of the company that new notes should be given by the Security Investment Company in exchange for the notes already held by the creditors, payable in three years after May 1, 1908, in the case of creditors who had collateral aggregating or exceeding the face amount of the notes, and in the case of other creditors, whether secured in part or unsecured, notes maturing in five years from May 1, 1908, were to be given.

Eighth. It was further provided that all the stock of the Westinghouse Electric & Manufacturing Company which was held as security for any notes then outstanding, as well as the new stock to be purchased, should be deposited with the Fidelity Title and Trust Company but should continue to be security for the notes for which it

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was originally pledged; and that the company should have the right to vote all the stock so deposited.

Ninth. It was further provided that the board of directors should be increased to nine members and provisions satisfactory to the Creditors' Committee should be made so that, as long as any of the notes remained unpaid, six of the members of the board of directors should be persons approved in writing by the committee.

Tenth. This plan, dated March 6, 1908, but not actually executed until December, 1908, was submitted by the creditors' committee to all creditors of the Security Investment Company, with the recommendation that it be signed, and it was signed by almost all the creditors, and among others by the plaintiffs.

Eleventh. Upon the presentation of this plan and agreement to the United States Court the company was taken out of the hands of the receiver and the change in the number of directors agreed upon was made, and six directors were elected who were nominated by the Creditors' Committee, the stock of the company being voted by the Safe Deposit & Trust Company, to whom it had been transferred by Mr. Westinghouse as trustee, to insure the carrying out of the agreement with the creditors as to control of the company.

Twelfth. After this plan of extension had been put in operation, the Security Investment Company entered upon no new business but its sole business consisted in attempting to liquidate its indebtedness by sale of securities and to procuring reductions from its creditors. In the meantime, before the maturity of the notes which ran for five years, Mr. Westinghouse purchased a large number of claims of creditors, for most of which he paid less than face value and for some very much less.

Thirteenth. At the 1st of May, 1913, when all the notes were due and the company had failed, owing to the continued depression in the value of the securities, to raise sufficient money to pay the debts, although a large number of the shares pledged had been sold and a large num-

ber of notes secured by them had been paid, and all of the new notes which all fell due on that day were still outstanding, the Fidelity Title & Trust Company, Trustee, which held these notes and securities, took up the matter of selling out the securities. It appears to have been agreed by the parties concerned that it was not wise to attempt to sell these securities at that time on account of the state of the market. At this time there were in various Pittsburgh banks notes of Mr. Westinghouse to the amount of \$666,000, which he had given for the purpose of supplying the deficit left by the failure of all the creditors to pay 25% of new money into the affair for the purpose of rehabilitating the Westinghouse Electric & Manufacturing Company, and there were other notes belonging to other persons outstanding, so that the whole amount of money which was necessary to pay the secured notes, with interest and expenses, was \$1,614,700. Mr. Westinghouse, in the summer of 1913, made efforts to provide for the money necessary to bid this amount when the stock should be sold and among others he attempted to procure the same from plaintiffs. He afterwards obtained the money by an arrangement with the Westinghouse Airbrake Company.

Fourteenth. The securities were thereupon advertised for sale in accordance with the provisions of the trust indenture at auction on October 7, 1913. When they were sold Mr. Westinghouse bid for them \$1,614,700, and they were sold to him at that price. He paid for them by having the notes surrendered to the trustee and cancelled and issued his own notes to the holders of the securities so cancelled for one-half thereof, pledging Westinghouse Electric stock purchased by him at the sale, and paying the other half in cash.

Fifteenth. Shortly thereafter Mr. Westinghouse proceeded to sell the Westinghouse Electric stock so acquired by him, the plaintiffs acting as his brokers for the sale of the whole of it, and the proceeds were used to take up the notes.

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Sixteenth. Mr. Westinghouse died March 12, 1915, and the defendants were appointed executors and his estate has been distributed in the Orphans' Court.

Seventeenth. After the change in the directorate of the Security Investment Company provided for by the plan of extension the affairs of the company were managed by an executive committee appointed by the board, composed of three of the directors who were designated by the Creditors' Committee; and Mr. Westinghouse as president and director took no active part in the affairs of the company and had no control of them. The sale made in October, 1913, was not procured by Mr. Westinghouse to be made, nor did he have any control or other means by which it could have been prevented.

Eighteenth. The claim of the plaintiffs against the Security Investment Company is \$130,253.05, with interest, and is an entirely unsecured claim, being the balance of an account with the company as brokers, for which the plaintiffs received in December, 1908, a new note made by the Security Investment Company under the plan of extension.

CONCLUSIONS OF LAW.

First. The plaintiffs contend, first, that under the facts of this case the Security Investment Company in incurring the debt to the plaintiff was in equity the agent of George Westinghouse, and that its debt was his; and secondly, that under the facts of the case, when George Westinghouse purchased, at the sale made by the Fidelity Title & Trust Company, on October 7, 1913, he took the shares purchased by him subject to a trust for the general creditors of the Security Investment Company, as to any excess of value or proceeds over the amount paid by him.

Second. As to the first contention of the plaintiffs, that Mr. Westinghouse is liable for the debts of the Security Investment Company because it was his agent, we are unable to see anything in the facts of the case which

would indicate any such agency, unless it is contended that the fact that Mr. Westinghouse owned all the stock of that company made it his agent. We do not conceive that this is really the plaintiffs' contention, but rather that the claim is that as Mr. Westinghouse owned all the stock of the Security Investment Company all its debts were his personal debts as being contracted by him although under another name. In other words, that the Security Investment Company was a mere alias for George Westinghouse. That courts will in proper cases look behind the act of incorporation and deal with the real owners to discover and control fraud there is no doubt, but the mere fact that one person is the sole stockholder in a corporation does not make him the same person with the corporation: *Monongahela Bridge Company v. Pittsburgh & Birmingham Traction Company*, 196 Pa. 25. We are therefore of opinion that Mr. Westinghouse is not liable for the note of the plaintiff upon this theory.

Third. Even if he were so liable, the plaintiff could not recover in this proceeding but must proceed by an action at law or, as Mr. Westinghouse is dead, against his estate in the Orphans' Court. No ground of equitable relief is presented by such a case, and the want of equity jurisdiction has been pleaded.

Fourth. The other, and as we apprehend the main ground upon which plaintiff prays for relief in this case, is the contention that under the circumstances Mr. Westinghouse was incapable of buying the shares from the Fidelity Title & Trust Company, Trustee, except as a trustee for the creditors of the Security Investment Company, because he was president of the company and a director of it, and the owner of its stock. It does not appear that, so far as the ownership of the stock is concerned, there is any difference in the relation to the company or its creditors, between the stockholder who owns part of the stock and one who owns all of it. Unless there is actual fraud in the case he is to be treated in

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each case as a mere stockholder. As a stockholder he may, of course, deal at arm's length with the company. As president and director of the company his relation is different, and if it appeared that acting in either capacity he had control of the sale it might be that he could not purchase for himself. In this case, however, it appears that the majority of the directors were named by the Creditors' Committee, and all of the executive committee were named by them, and that Mr. Westinghouse had no real control of the company and no means of controlling the sale, and further, that he had no funds nor were any funds available for the payment of the debt on which the sale was made. We are therefore of opinion that the purchase by Mr. Westinghouse of the shares in question, under the circumstances in this case, was not a purchase in trust for the Security Investment Company or its creditors.

The bill must, therefore, be dismissed, with costs to be paid by the plaintiffs.

The lower court dismissed the bill. Plaintiffs appealed.

Error assigned, among others, was in dismissing the bill.

Samuel McClay, with him *David A. Reed*, of *Reed, Smith, Shaw & Beal*, for appellants.

George B. Gordon, of *Gordon & Smith*, with him *John G. Buchanan*, for appellees.

PER CURIAM, January 7, 1918:

The complaint of the appellants in seeking to impose liability upon the estate of George Westinghouse, deceased, is that his acquisition of the assets of the Security Investment Company constituted and was a breach of the relationship of trust and confidence in which he stood to them, and was a fraud in law and equity upon their

rights. The thirty-fifth fact found by the learned chancellor below, at the request of the appellees, is: "Mr. Westinghouse did not at the time of any of the purchases made by him from the Security Investment Company occupy any relation of trust or confidence to the company with reference to said sales, or any of them, nor did he have any voice or exercise any influence as to the amount of money which the Security Investment Company was willing to take for said property or any of it." This fact, justified by the evidence, put an end to complainants' case. The material facts appear in the opinion of the court below dismissing the bill, and, on that opinion, subsequently immaterially modified as to the third finding of fact, the decree is affirmed at the costs of the appellants.

Pittsburgh Block Coal Company v. Oliver Coal Company et al., Appellants.

Contracts—Suretyship—Coal lands—Receipts—Explanation—Evidence—Legal effect of receipt—Admission in pleadings—Excessive verdict—Motion for new trial—Charge of court—Failure to request.

1. In an action by a lessor of coal lands on a joint bond given by the lessee as principal, and a surety, one of the conditions being for the payment of royalty upon coal actually mined, the controlling question was the effect to be given a certain receipt and the evidence relating thereto. The receipt was given by the plaintiff company to the defendants' president as trustee of insurance money and was in the following form: "Received of [plaintiff's president, naming him] Trustee, One thousand seventy-five Dollars in payment as follows: By direction of Oliver Coal Co. for its account: \$376.27 Bal. Nov. 1912 royalty; \$344.30 on 1912. Minimum under lease, \$279.53 for Jany. 1913 royalty; \$75 for boiler tube cleaner." A fire had occurred on the leased premises and the insurance company paid the amount of the loss by check to the joint order of the lessor and lessee, but before the latter would endorse the check it required a trusteeship to be established with the plaintiff's president as trustee. The receipt in question represented the disposition of a part of the insurance money by the trustee. Plaintiff's

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president testified that the receipt was given in the office of the president of the defendant company and was drawn up in accordance with the direction of defendant's president, treasurer and general manager, and that the receipt was not intended as a receipt in full, but that at the time it was given there was overdue from the defendant company to the plaintiff \$2,800 for coal actually mined. Under defendant's objection the court admitted in evidence a paragraph of plaintiff's statement setting forth that such amount was due for royalties on coal mined, on the ground that the averments of such paragraph were not sufficiently or specifically denied in the affidavit of defense. *Held*, (1) such evidence was properly admitted, and (2) the receipt was not conclusive against the right of the plaintiff to recover, and the case was for the jury and a verdict for the plaintiff will be sustained.

2. In such case it could not be successfully contended on motion for judgment non obstante veredicto that the receipt was, at any rate, in full for all coal mined during the month of November, 1912, and that the verdict of the jury included \$500 for royalty on coal mined during that month, and was erroneous to that extent, where it was not clear from the record that the jury included such item in their verdict; if the jury had included such item the proper method for correction thereof was by a motion for a new trial.

3. In such case the complaint cannot be made that the trial judge did not sufficiently instruct the jury as to the proper effect to be given to the receipt where the question of the effect of the receipt did not appear to have been raised upon trial, and it did appear that plaintiff's counsel presented thirteen points for charge but none of them related to the receipt.

4. Assignments of error covering questions not included in the statement of questions involved will not be considered on appeal.

Argued Oct. 16, 1917. Appeal, No. 160, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., Oct. T., 1915, No. 630, on verdict for plaintiff in case of Pittsburgh Block Coal Company, a Corporation, v. Oliver Coal Company, a Corporation, and Maryland Casualty Company, a Corporation. Before BROWN, C. J., POTTER, MOSCHISKE, FRAZER and WALLING, JJ. Affirmed.

Assumpsit on bond. Before REID, J.

The facts appear by the opinion of the Supreme Court.

Verdict—Opinion of the Court. [259 Pa.

Verdict for plaintiff for \$2,350.67 and judgment thereon. Defendants appealed.

Errors assigned, among others, were charge of court and in refusing defendants' motion for judgment non obstante veredicto.

Arthur E. Young, with him *Johnston & Rose*, for appellants.—To recover, plaintiff is bound to overcome the receipt by precise and convincing or satisfactory evidence: *Harris v. Hay*, 111 Pa. 562; *Rhoads's Est.*, 189 Pa. 460; *MacDonald v. Piper*, 193 Pa. 312; *Chapman v. Railroad Company*, 7 Philadelphia 204; *Hopkins v. Wise*, 33 Pa. Superior Ct. 544; *Paige v. Paige*, 53 Pa. Superior Ct. 311; *Daly v. Dallmeyer*, 20 Pa. Superior Ct. 366; *Cooper v. Cooper*, 60 Pa. Superior Ct. 390; *Guhl v. Frank*, 22 Pa. Superior Ct. 531; *Estate of Young*, 16 Philadelphia 215; *Elliott v. Curry*, 1 Philadelphia 281; *Saving Fund v. Marks*, 3 Philadelphia 278.

The only evidence adduced by plaintiff to overcome the receipt in full was the uncorroborated testimony of its president, who signed the receipt. His testimony was not clear or precise, convincing or satisfactory.

The court erred in failing to instruct the jury as to the legal effect of the plaintiff's receipt.

It was impossible for counsel for defendant at the close of the court's charge, even at the court's suggestion, to have cured the many and manifest errors in the same by requesting further instructions: *Reber v. Schitler*, 141 Pa. 640; *Peirson v. Duncan*, 162 Pa. 187; *Pennsylvania Canal Co. v. Harris*, 101 Pa. 80; *Garrett v. Gonter*, 42 Pa. 143; *Washington Mutual Fire Insurance Co. v. Rosenberger*, 3 W. N. C. 16.

W. A. Griffith, of *Griffith & Kennedy*, with him *Ralph Strawbridge*, for appellee.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

This was an action of assumpsit brought by the Pitts-

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burgh Block Coal Company against Oliver Coal Company and Maryland Casualty Company to recover upon a bond given by defendants, as principal and surety respectively, to plaintiff. The condition of the bond required faithful performance, by the Oliver Coal Company, of the terms of a lease for certain coal property, and the payment of the royalty upon the coal actually mined therefrom. In its amended statement, plaintiff claimed a balance of \$2,416.10 for unpaid royalties on coal actually mined under the lease by defendant. Liability was denied upon the ground that all royalty upon coal actually mined had been paid, and certain other defenses were set up, with which we are not here concerned, as they are not included in the statement of questions involved. Upon the trial, requests for binding instructions for defendants generally, and for the surety company separately, were refused, and the case was submitted to the jury, who found a verdict for the full amount of the bond with interest. Defendants have appealed, and their counsel have confined their argument to the effect to be given to a certain receipt, and to the evidence relating to it. The receipt was given by the plaintiff company to Mr. Ewing as trustee of certain insurance money. It was offered in evidence and is as follows:

"Pittsburgh, Pa., 2/18, 1913.

"Received of John K. Ewing, Jr., Trustee, One Thousand seventy-five Dollars in payment as follows: By direction of Oliver Coal Co. for its account: \$376.27 Bal. Nov. 1912 royalty; \$344.30 on 1912. Minimum under lease, \$279.53 for Jan. 1913 royalty; \$75 for boiler tube cleaner.

"\$1,075.00.

"PITTSBURGH BLOCK COAL CO.,
"JNO. K. EWING, JR."

Mr. Ewing was president and treasurer of the plaintiff company. On December 1, 1912, a fire occurred on the leased premises, and the insurance company paid the amount of the loss by check to the joint order of lessor

and lessee. Before the latter would endorse the check it required a trusteeship to be established with Ewing as trustee. The receipt in question represented the disposition of a part of the insurance money by the trustee. Ewing testified that it was given in the office of Dr. Johnston, president of the Oliver Coal Company, in the presence of Johnston and of Dr. McIntyre, its treasurer and general manager, and that it was written out in accordance with their directions. Ewing further testified that the receipt was not intended as a receipt in full, but that, at the time it was given, there was overdue from the Oliver Coal Company to the plaintiff company some \$2,600 for coal actually mined. It will be noted that the receipt was not given to the Oliver Coal Company, but was given by plaintiff to Ewing, as trustee of the insurance money, and by way of accounting for the distribution by the trustee of that much of the fund. Nor does the receipt purport to be in full for all royalties for coal mined at the time it was written, but only for the balance of November, 1912, royalty. Counsel for plaintiff offered in evidence the fifth paragraph of its amended statement of claim, which is as follows: "5. That beginning with the month of May, 1912, and ending with the month of January, 1914, both inclusive, the said Oliver Coal Company mined and removed from the said premises a total of 105,702.31 tons of coal, wherein and whereby it became indebted to the plaintiff in the total sum of \$10,570.23, at the rate of ten cents per ton; that during the same period said Oliver Coal Company paid to the plaintiff on account thereof the sum of \$8,154.13, leaving a balance due of \$2,416.10 for coal actually mined." Objection by counsel for defendant to this offer was overruled upon the ground that this paragraph of the statement was not specifically or sufficiently denied in the affidavit of defense, and the overruling of the objection is not assigned as error. In view, therefore, of what must be regarded as an admission in the pleadings, that \$2,416.10 was due for royalties for coal actual-

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ly mined, and the fact that the receipt by its terms relates only to the balance of November, 1912, royalty, the trial judge could not properly have ruled that the receipt was conclusive of the right of plaintiff to recover, nor could he have taken the case from the jury.

Counsel for appellants argue that the receipt was, at any rate, in full for all coal mined during the month of November, 1912, and that, as the verdict of the jury included \$500 for royalty on coal mined during that month, it was erroneous to that extent. But it is not clear from the record that the jury included in their verdict \$500 of unpaid royalty for coal mined in the month of November, and, even if they did, that would be a matter for correction upon a motion for a new trial, and would be no reason for binding instructions in favor of defendants, which would prevent the recovery of any amount by plaintiff. Counsel further contend that, if the receipt be construed as being in full for November, it would also be prima facie evidence that all amounts due for prior royalties had been paid. Conceding this, there was ample evidence, as noted above, to rebut any such presumption.

In several of the assignments of error complaint is made that the trial judge did not in his instructions to the jury give sufficient consideration to the proper effect to be given to the receipt. Whether he did or not, it appears that counsel for defendants presented thirteen points requesting instructions to the jury, and in none of them was any instruction requested in regard to the receipt, its legal effect, or the evidence necessary to overcome it. And when at the close of the charge the trial judge asked counsel if they wished any further instructions to be given to the jury, they said, "no."

The question of the effect of the receipt does not seem to have been raised upon the trial, nor in defendants' motion and reasons for a new trial, which were filed February 8, 1917, but it was first raised in their additional reasons in support of the motion for a new trial filed on

June 21, 1917, more than five months afterward. This matter seems to have been entirely an afterthought, which came too late. In *Moyer v. Penna. R. R. Co.*, 247 Pa. 210, we said (p. 217): "The remaining assignment alleges error in the instruction given as to the measure of damages. No special instructions on this branch of the case were asked for, and those given were not complained of at the time, though full opportunity was given counsel to indicate wherein in their judgment they came short, or were for any reason unsatisfactory. We are not convinced that any error was committed; the instructions were perhaps open to the criticism that a fuller discussion of the subject by the court might have been helpful to the jury, but this either side could have had upon request. It is too late now to make complaint." And again in *Fern v. Penna. R. R. Co.*, 250 Pa. 487, we said (p. 495): "The criticism by the appellant as to the insufficiency of the charge on the question of damages cannot be sustained. What was said by the court may not have been entirely adequate but it was not erroneous. The inadequacy of the charge cannot be regarded as reversible error, in view of the fact that in reply to the court's inquiry whether any further instructions were required counsel expressed themselves as fully satisfied with the charge."

Several other assignments of error, which are to portions of the charge, seek to raise questions not included in the statement of questions involved. They were not argued by counsel for appellants, and they call for no consideration here. A careful examination of the record and of all the testimony, has satisfied us that the case was properly submitted to the jury, in a correct and adequate charge, and that the verdict was justified by the evidence.

The assignments of error are overruled, and the judgment is affirmed.

**Rohrer, Appellant, v. Trafford Real Estate
Company.**

Real estate—Deeds—Building restrictions—"Single dwelling house" on each lot—Erection of duplex building or apartment house—Bill in equity—Dismissal.

1. Covenants restraining a man in the free enjoyment of his property are not to be extended by implication.

2. The building of a duplex building or apartment house is not a violation of a restriction limiting the owner to one dwelling house upon a lot, the test being whether the building is a single structure intended for dwelling purposes and not whether it was intended to house more than one family.

3. Where the conveyance of a lot of ground from defendant to plaintiff contained a building restriction that but "a single dwelling house" should be erected on the lot, and also a covenant that like restrictions should be imposed in any other conveyance of property made by the defendant in the district mentioned, and thereafter conveyances of other lots were made by defendant with the provision that the restriction should not be construed to prohibit the erection of a duplex dwelling or apartment house, plaintiff's bill in equity for the enforcement of the building restriction, on the ground that a duplex dwelling or apartment house was not "a single dwelling house" within the meaning of the covenant of his deed, was properly dismissed.

Argued Oct. 18, 1917. Appeal, No. 183, Oct. T., 1917, by plaintiff, from decree of C. P. Allegheny Co., Jan. T., 1916, No. 836, in equity, refusing relief on bill in equity to enforce building restrictions in case of Frederick F. Rohrer v. Trafford Real Estate Company, a Corporation. Before BROWN, C. J., POTTER, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Bill in equity to secure enforcement of building restrictions. Before EVANS, J.

The facts appear by the opinion of the Supreme Court. The lower court dismissed the bill. Plaintiff appealed.

Assignment of Error—Opinion of the Court. [259 Pa.

Error assigned, among others, was in dismissing the bill.

U. G. Vogan, for appellant.—The words “single dwelling house” as applied to a building restriction do not include an apartment house: *Harris v. Roarback*, 100 N. W. 391; *Bagnall v. Young*, 114 N. W. 674; *Schadt v. Brill*, 173 Mich. 647; *Powers v. Radding*, 113 N. E. 782; *Brigham v. H. J. Mulock Co.*, 74 N. J. E. 287; *Gillis v. Bailey*, 21 N. H. 149; *Hutchinson v. Ulrich*, 145 Ill. 336.

John G. Buchanan, with him *Gordon & Smith*, for appellees.—An apartment house or duplex dwelling is “a single dwelling house” within the meaning of a building restriction: *St Andrew’s Lutheran Church’s App.*, 67 Pa. 512; *Johnson v. Jones*, 244 Pa. 386; *Hamnett v. Born*, 247 Pa. 418; *McMurtry v. Phillips Investment Co.*, 103 Ky. 308; *Sonn v. Heilberg*, 38 N. Y. App. Div. 515; *Kimber v. Adams*, 1 Ch. 1900, 412.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

The plaintiff purchased from the defendant a lot of ground, and, in the conveyance to him, a building restriction was inserted, which provided that but “a single dwelling house” should be erected on the lot. There was also a covenant in the deed that like restrictions should be imposed in any other conveyance of property made by defendant within the district mentioned. Conveyances of such lots were made by defendant, however, with a provision that the restriction should not be construed to prohibit the erection of a duplex dwelling or apartment house upon the lots conveyed. Claiming that a duplex dwelling, or an apartment house, was not “a single dwelling house,” and that the covenant in his deed had, therefore, been violated, plaintiff filed this bill to secure the enforcement of the building restriction in accordance with his contention. The court below dismissed the bill, holding that the question is ruled by the

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decision of this court in *Johnson v. Jones*, 244 Pa. 386, in which it was held that an apartment house was properly to be classified as a dwelling house, and by the decision in *Hamnett v. Born*, 247 Pa. 418, where it was held that a "duplex house" could fairly be regarded as "one dwelling house." We can see no distinction in principle between the question determined in those cases, and that which is here involved. The building here proposed is precisely like that to which objection was made in *Hamnett v. Born*, *supra*, where it was held that the building of a duplex dwelling house was not a violation of a restriction limiting the owner to "one dwelling house" upon the lot. The fact that the building was intended to house more than one family was not regarded as controlling in the determination of the question, for as the court there said: "The covenant is directed against the building alone, and not its subsequent use, and when a building is lawfully erected on either of the lots, so far as the building is concerned, the covenant is at an end. The fact that the building proposed is a single structure intended for dwelling purposes brings it within what is permitted under the restriction; the fact that it is intended to accommodate a number of families, does not bring it within what is forbidden."

We agree with the court below that the stipulation was for a single house or structure, and not for a house for a single family; and that, if the latter had been intended, it would have been easy to say so. "Covenants of this nature, which restrain a man in the free enjoyment of his property are not to be extended by implication": *St. Andrew's Lutheran Church's App.*, 67 Pa. 512.

The assignments of error are overruled, the decree of the court below is affirmed, and this appeal is dismissed at the cost of appellant.

Van v. Richmond et al., Appellants.

Master and servant—Bricklayer—Fall of brick arch on workman—Assumption of risk—Contributory negligence—Conflicting evidence—Preponderance of evidence with defendant—Case for jury.

1. The credibility of oral testimony is for the jury.

2. Where the testimony offered by the plaintiff makes out a prima facie case by showing the existence of facts from which an inference of negligence arises, the case is necessarily for the jury, notwithstanding that the great preponderance of the testimony is with the defendant. An inference of negligence having once arisen remains until overcome by countervailing proof, and whether it is so overcome is a question for the jury.

3. In an action against building contractors to recover for injuries sustained by the falling of a brick arch on a workman, where it appeared that during the construction of the building plaintiff was assigned by the defendants to build such arch on a supporting wooden form erected by defendants' carpenters, that after the completion of the arch it fell on the plaintiff causing the injuries complained of, and the evidence was conflicting as to how the fall of the arch was occasioned, plaintiff's version being that the form had been removed at the direction of defendants' foreman, that plaintiff had complained to him of its removal but that the foreman had assured him that it was safe, that relying upon the foreman's forty years' experience plaintiff continued at his work and three quarters of an hour later the arch fell, while defendants' version was that the form had not been removed but that the arch fell by reason of plaintiff's placing his body or leg over it, causing it to buckle, and that plaintiff had admitted thereafter that the occurrence was his own fault, the court did not err in refusing to charge that as a matter of law plaintiff had assumed the risk.

4. In such case the court did not err in refusing to charge that the duty rested on the plaintiff to establish by the weight of evidence that there was no act or omission on his part, as an experienced bricklayer, amounting to want of ordinary care, which concurred with the alleged negligence of the defendants in causing the injury.

Argued Oct. 18, 1917. Appeal, No. 79, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., Jan. T., 1916, No. 1848, upon verdict for plaintiff in case

1918.] Statement of Facts—Opinion of the Court below.

of J. Wesley Van v. Andrew Richmond and John L. Richmond, Copartners, trading and doing business as A. Richmond & Son, with notice to W. J. Morrison, Administrators of Andrew Richmond, deceased. Before BROWN, C. J., POTTER, MOSCHZISKE, FRAZER and WALLING, JJ. Affirmed.

Trespass for personal injuries.

The facts appear from the following opinion by BROWN, J., sur defendants' motions for a new trial and for judgment non obstante veredicto:

Plaintiff, a bricklayer employed by defendants in building a residence, brought this action to recover damages for personal injuries received on the 7th of August, 1915—injuries to his arm, back, head and sight and hearing, causing pain and suffering and loss of earnings and impaired power to work and to earn.

Plaintiff's story, as told by himself and witnesses, was: that on August 6, 1915, carpenters—at direction of defendants' foreman—having put in place a supporting wooden form, he built thereon a brick arch, using mortar furnished by defendants. The brick arch was completed that day—leaving for the next day the laying of brick on the sides next the arch. When plaintiff came to work on the morning of the 7th, discovering the supporting wooden form had been taken out, at the direction of defendants' foreman, he complained to the foreman about the question of safety; and the foreman told him it was safe—to go ahead with the work; and resting upon the superior knowledge of the foreman of forty years' experience he went on with the brick work—at the sides next the arch; and three-quarters of an hour later the arch buckled and fell, striking and carrying him, and the platform on which he was, down some nine or ten feet.

Touching this question of safety—at the time plaintiff went to work the morning of June 7th—we quote a portion of his testimony:

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Q.—Before you went to work did you say anything to Mr. Briggs (foreman) about the safety of this thing?

A.—I did.

Q.—What did you say to him?

A.—I told him it was not safe, and he promised to get a prop and put it up there to save it from falling.

Q.—Save what from falling?

A.—The arch from buckling. It didn't look safe to me, and I mentioned it to him.

Q.—Did he think it was safe?

A.—Yes, sir; he told me it was safe and I relied on his word for it to be safe.

Q.—Then did he tell you to go to work?

A.—Yes, sir.

Q.—Instructed you to go to work did he?

A.—Yes, sir.

Q.—And told you it was safe?

A.—Yes, sir.

Q.—Was there anything about it that looked as though the thing would fall immediately?

A.—Well, it didn't look just right.

Q.—It wasn't cracked, was it?

A.—No, sir.

Q.—And didn't look as though it was going to fall that instant?

A.—No, sir.

Q.—Looked as though it might hold itself for awhile?

A.—Yes, sir.

Q.—How long did it hold itself?

A.—About three-quarters of an hour.

Q.—After you started to work?

A.—Yes, sir.

Q.—What caused that thing to break?

A.—It buckled.

It will be observed by this testimony that plaintiff—awaiting fulfillment of the foreman's promise to put up props, to support the arch—was not working under nor in front of the arch, but at the side, laying and building

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up the brick work; and therefore not exposing himself under nor in front of the arch.

Defendant's story, as told by their witnesses, was: that the supporting wooden arch had not been taken out by the carpenters, nor directed to be taken out, as alleged by plaintiff; that plaintiff was not working on brick construction at the sides of the arch—at the time of the accident, but just preceding the accident, had placed his body or leg over the arch, causing it instantly to buckle and fall.

Plaintiff denied placing his body or leg over the arch.

Some of the defendant's witnesses testified to plaintiff's admission, on several occasions, that the injury was all his own fault, and nobody to blame but himself. Plaintiff alleged the admissions were due to fear that he might not be employed or able to get work.

The credibility of the testimony—all oral—was for the jury: *Lindemann v. Pittsburgh Railways Co.*, 251 Pa. 489; *Anderson v. Railways Co.*, 251 Pa. 517. Credibility is the touchstone of testimony in the measure of its weight. As said by Mr. Justice FELL, in *Rauch v. Smedley*, 208 Pa. 175, 176, and by Mr. Justice STEWART in *Simons v. Philadelphia & Reading Ry. Co.*, 254 Pa. 507-509:

"Where the testimony offered by the plaintiff makes out a *prima facie* case by showing the existence of facts from which an inference of negligence arises, the case is necessarily for the jury, notwithstanding that the great preponderance of the testimony is with the defendant. An inference of negligence having once arisen remains until overcome by countervailing proof, and whether it is so overcome is a question for the jury."

The charge presented to the jury: The issues of fact to be passed on by it; the method of weighing and measuring testimony—lay and expert; the duty of determining the nature and extent of plaintiff's injuries—nervous and physical; and the measure of damages. And its attention was drawn to the duty resting upon an employer

to furnish his employee with a reasonably safe place to work and proper tools and appliances; and upon an employee not to be careless of himself in the line of his work. Its attention was also drawn to the question of plaintiff's equal or unequal knowledge of the danger—and whether he acted and had the right to act upon the superior knowledge of the foreman of forty years' experience: *Molesky v. South Fork Coal Mining Co.*, 247 Pa. 434.

The reasons assigned by defendants for a new trial are:

1. The verdict in said case is contrary to the evidence.
2. The verdict in said case is contrary to the weight of the evidence.
3. The verdict in said case is contrary to law.
4. The court erred in refusing defendants' second, sixth, twelfth, thirteenth, fourteenth and fifteenth points submitted.

Defendants' second, sixth, twelfth, thirteenth, fourteenth and fifteenth points—with the answers of the court thereto—are as follows:

"Second: If the jury believe that plaintiff was directed by defendants' foreman to continue his work at the arch after the form was removed before sufficient support had been placed under the arch, and plaintiff continued his work as a brick mason, notwithstanding, he assumed the risk involved and therefore cannot recover.

By the Court: As a whole, this point is refused because it involves an issue of fact to be passed on by the jury—an issue of fact covered by the general charge.

Sixth: Plaintiff must establish by the weight of evidence that there was no act or omission on his part as an experienced bricklayer, amounting to a want of ordinary care, which in concurrence or coöperation with the alleged negligence of defendants was the proximate cause or occasion of the injury.

By the Court: This point is refused, because the burden of establishing plaintiff's acts of omission—want of care—is on the defendant.

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Twelfth: If the jury believe that plaintiff just before the accident could have proceeded with his work of laying up brick in against the wall without first building the temporary or foot staging, the breaking of which by the fall of brick from the arch caused him to fall, he was guilty of contributory negligence and cannot recover.

By the Court: Refused.

Thirteenth: It appearing by a preponderance of testimony that plaintiff admitted on numerous occasions afterwards that the accident was caused by his own carelessness, as testified to by Addison Brieges or Briggs, John Cornyn, Sr., John Cornyn, Jr., Solomon Wensel and John L. Richmond, the jury should be instructed to find for the defendants.

By the Court: Refused.

Fourteenth: It appearing from uncontradicted evidence that plaintiff could have proceeded to point up the courses of the pier by standing upon a ladder, placed upon the outside of the pier, his failure to do so constitutes contributory negligence and is a bar to his recovery.

By the Court: Refused.

Fifteenth: That under all the evidence in the case the court should direct that the jury render its verdict in favor of the defendants.

By the Court: Refused.

We cannot say that the verdict is contrary to the evidence, the weight of the evidence, and the law.

In the light of (a) the disputed issues of fact and (b) the law—as outlined in the charge—we think no substantial error was committed by the court in its answers to defendants' points.

Close as the case was upon its conflicting testimony it raised issues of fact upon which the jury alone had power to pass and decide.

Believing that a fair trial was had the motions for judgment non obstante veredicto and for a new trial are refused.

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J. Boyd Duff, of J. Boyd Duff & Son, with him Packer & Sherrard, for appellants.

Stephen Stone, of Stone & Stone, with him J. Thomas Hoffman, for appellee.

PER CURIAM, January 7, 1918:

The judgment in this case is affirmed on the opinion of the learned court below denying the motions for a new trial and for judgment non obstante veredicto.

Kennedy et al., Appellants, v. Meyer et al.

Constitutional law—Constitution of Pennsylvania, Art. III, Secs. 7 and 11, Art. IX, Sec. 7, and Art. I, Sec. 1—Declaration of Rights—Local and special laws—Gratuities—Contractors—Encroachment on judicial prerogatives—Counties—Contracts—Work done under unconstitutional act—Curative act—Constitutionality—Acts of May 11, 1909, P. L. 506, and April 20, 1917, P. L. 90—Statutes—Construction—Bill in equity—Injunction—Dismissal.

1. All presumptions must be drawn in favor of the validity of an act and the propriety of the legislative intention.

2. The courts are loath to hold curative acts to be special or local legislation when they are drawn to apply to all persons, things or subjects affected by the conditions to be remedied.

3. Where an act relating to counties in terms applies to all counties in the State, it is presumptively a general statute.

4. Where the legislature has power to enact the substance of the matter covered by a statute which has been declared void because unconstitutional in form, it may subsequently ratify and make legal anything done under the prior void legislation which it might previously have authorized in due form. The authority of the legislature to ratify whatever it might have authorized is beyond question.

5. The Act of April 20, 1917, P. L. 90, providing that whenever any county has entered into a contract for the construction of a public highway bridge or tunnel and the same has been completed in whole or in part, but (the county) was without power to pay for the work which had been actually done (because the act under

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which such work was done had been declared unconstitutional), such contract is valid and binding on the county to the extent only that such work and construction was done or made prior to the date on which said act was declared unconstitutional, and providing for the payment of such work from the county treasury, is not a local or special law in violation of Article III, Section 7, of the Constitution and is valid.

Sample v. Pittsburgh, 212 Pa. 533, distinguished.

6. The Act of 1917 does not offend against Article III, Section 11, of the Constitution, prohibiting legislation giving extra compensation to any public officer or contractor after services shall have been rendered or contract made or providing for the payment of any claim against the Commonwealth without previous authority of law, since such act applies to counties and not to claims against the Commonwealth, and makes no provision for extra compensation but merely for compensation for work not paid for.

7. The Act of 1917 does not treat the obligations with which it deals as gratuities, such as contemplated by the constitutional inhibition in Article IX, Section 7, of the Constitution, but as moral obligations that have ceased to be legal ones merely because of defects in the statute which authorized them.

8. The legislature may impose a tax to pay the expense of a public improvement which had been made under invalid authority, and an assessment for that purpose, or payment for such improvement from the moneys of the public treasury raised by general taxation or otherwise, is not a taking or deprivation of property, and the Act of 1917 is not therefore violative of Article I, Section 1, of the Constitution.

9. The Act of 1917 is a curative act and does no more than to effectively authorize (within the restrictions of the statute) what had previously been defectively authorized by the Act of May 11, 1909, P. L. 506, and does not attempt to decide any judicial question, and is not an assumption by the legislature of judicial powers.

10. County commissioners entered into a contract under authority of the Act of May 11, 1909, P. L. 506, for the construction of a public highway tunnel. Before the completion of the work the Act of 1909 was declared unconstitutional by the Supreme Court by reason of insufficiency of its title. After the passage of the curative Act of April 20, 1917, P. L. 91, a taxpayer's bill was filed to enjoin payment to the contractor for work done on such tunnel prior to the date on which the Act of 1909 was declared unconstitutional, on the ground that the Act of 1917 was unconstitutional. *Held*, the bill was properly dismissed.

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Argued Oct. 15, 1917. Appeal, No. 144, Oct. T., 1917, by plaintiffs, from decree of C. P. Allegheny-Co., July T., 1917, No. 838, in equity, dismissing bill in equity for injunction in case of Julian Kennedy, Oliver McClintock and Harry H. Willock, Citizens and Taxpayers of Allegheny County, v. Gilbert F. Meyer, Addison C. Gumbert, and Frank J. Harris, Commissioners of Allegheny County; John P. Moore, Comptroller of Allegheny County; Edward D. Friebertschauser, Treasurer of Allegheny County, and Booth & Flinn, Ltd. Before BROWN, C. J., POTTER, MOSCHZISKE, FRAZER and WALLING, JJ. Affirmed.

Bill in equity against county commissioners and county treasurer to restrain payment to contractor on claim founded on the Act of April 20, 1917, P. L. 90. Before SWEARINGEN, J.

The facts appear by the opinion of the Supreme Court.

The lower court sustained defendants' demurrer and dismissed the bill. Plaintiffs appealed.

Error assigned, among others, was in dismissing the bill.

Ernest C. Irwin, with him *Watson & Freeman*, for appellants.—The Act of 1917 is void as being an assumption of judicial powers by the legislature: *Swartz v. Carlisle Borough*, 237 Pa. 473; *Marshall Avenue*, 213 Pa. 516; *Hewitts' App.*, 88 Pa. 55; *Donley v. City of Pittsburgh*, 147 Pa. 348; *Wyoming Street*, 139 Pa. 494; *People v. Board of Supervisors*, 26 Mich. 22; *Felix v. County Commissioners*, 62 Kansas 832; *The Mayor & City Council of Balt. v. Horn*, 26 Md. 194; *Forster v. Forster*, 129 Mass. 559; *DeChastellux v. Fairchild*, 15 Pa. 18; *Lambertson & McClelland v. Hogan*, 2 Pa. 22; *Greenough v. Greenough*, 11 Pa. 489; *Reiser v. The William Tell Saving Fund Association*, 39 Pa. 137.

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Arguments.

The Act of 1917 violates Article III, Section 11, of the Constitution.

The Act of 1917 is violative of Article IX, Section 7, of the Constitution: *Kreusler v. McKees Rocks School District*, 256 Pa. 281.

The Act of 1917 is local and special legislation and is void: *Sample v. Pittsburgh*, 212 Pa. 533.

John O. Wicks, with him *Lee C. Beatty*, *John S. Weller* and *Simon T. Patterson*, for appellees.—The Act of 1917 is not a local or special law since by its terms it applies to all contracts entered into by any county of the Commonwealth under the Act of May 11, 1909, P. L. 506: *Sample v. Pittsburgh*, 212 Pa. 533; *Carlstadt National Bank v. Borough of Hasbrouck Heights*, 83 N. J. L. 383; *State ex rel. Board of Education v. Brown*, 106 N. W. 477.

The act does not conflict with Article III, Section 11, of the Constitution, prohibiting the giving of extra compensation to contractors nor does it authorize a provision in contravention of Article IX, Section 7, of the Constitution. The Act of 1917 is not an assumption by the legislature of judicial powers: *County Commissioners' Petition*, 255 Pa. 88; *Devers v. York City*, 150 Pa. 208; *Melick v. Williamsport*, 162 Pa. 408; *Creighton v. San Francisco*, 42 Cal. 446; *O'Brian & Co. v. County Commissioners of Baltimore County*, 51 Md. 15; *Thomson v. Lee County*, 3 Wal. 327.

Where there is a moral obligation existing against a city, county or other municipal division of the State, which cannot be enforced at law or in equity, it nevertheless constitutes good consideration for the payment of public money and there is no constitutional limitation placed upon the legislature preventing it from legalizing such obligations: *Bailey v. Philadelphia*, 167 Pa. 569; *Commonwealth v. Walton*, 236 Pa. 220; *Vare v. Walton*, 236 Pa. 467; *Cunningham v. Dunlap*, 242 Pa. 341; *Longstreth v. City of Philadelphia*, 245 Pa. 233; *Bellevue*

Borough v. Gibson, 43 Pa. Superior Ct. 561; Justice v. Philadelphia, 37 Pa. Superior Ct. 267; Cleveland v. Board of Jersey City, 38 N. J. L. 259; Chester City v. Black, 132 Pa. 568.

OPINION BY MR. JUSTICE MOSCHZISKE, January 7, 1918:

In this case a bill in equity was dismissed, and the complainants have appealed. The learned court below has dealt with the issues involved so satisfactorily that, after examining and considering all the authorities cited, we have concluded to dispose of the appeal on the following excerpts from its opinion, with a few relevant additions at several points, and some discussion of complainants' chief contentions, which we shall add at the end.

The court below states: "Pursuant to the Act of May 11, 1909, P. L. 506, the commissioners of Allegheny County, on November 18, 1914, presented their petition to the Court of Quarter Sessions.....for the construction of a public highway tunnel. In due course, the case came before the grand jury [as required by the Act of 1909, *supra*], which, on December 31, 1914, approved the project. Exceptions were filed wherein, *inter alia*, the constitutionality of the act [under which the proceedings were had] was denied. After argument, the court, on March 13, 1915, dismissed the exceptions and ordered the tunnel to be constructed. Thereupon, the commissioners entered into a contract with Booth & Flinn, Ltd., ...and the contractor proceeded with the work. June 18, 1915, an appeal was taken to the Superior Court. November 29, 1915, the Superior Court affirmed the judgment: Allegheny County Commissioners' Case, 61 Pa. Superior Ct. 591. February 25, 1916, an appeal was allowed by the Supreme Court. July 1, 1916, that court reversed the judgment of the Superior Court upon the single ground that the Act of May 11, 1909, was unconstitutional because its title failed to indicate the

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legislative purpose.....: County Commissioners' Petition, 255 Pa. 88. Prior to the decision of the Supreme Court the contractor had done work to the value of about \$53,000.

"By an act approved April 20, 1917, P. L. 90, the legislature enacted that, whenever any county had [therefore] entered into a contract or contracts for the construction of a public highway, bridge or tunnel and the same had been completed in whole or in part, but [the county] was without power to pay for the work which had been actually done [because the act under which such work was done had been declared unconstitutional], 'now by this act such contract is made valid and binding on such county, to the extent only that such work and construction was done or made prior to the date on which said act was declared unconstitutional; and such county is hereby authorized and directed to ascertain and pay for all work done and materials furnished, under the terms of said contract, to the party or parties who performed the same. [The act continues: 'Such work, or such part thereof as was actually done at the date on which said act was declared unconstitutional, shall be paid for from county funds out of the county treasury, at the prices fixed for the payment of the same under the terms of the contract so entered into, in pursuance to the terms of said act. Nothing in this act shall be so construed as to make valid any resolution or contract except to the extent that work was actually done and performed prior to the date on which said act of assembly was declared unconstitutional.']

"The commissioners.....have approved the claim of Booth & Flinn, Ltd., for the value of the work done; the county controller is about to draw a warrant for its payment; and the county treasurer is about to pay the same out of county funds.....The complainants, on their own behalf and on behalf of all other taxpayers who may intervene, filed this bill, wherein they aver that the Act of April 20, 1917, P. L. 91, is unconstitutional and

pray that an injunction be issued forbidding payment of the claim. The defendants demurred to the bill.

"The complainants aver that the Act of April 20, 1917, is unconstitutional because it is local and special legislation, contrary to Article III, Section 7, of the Constitution; and because it is in violation of Article III, Section 11, and Article IX, Section 7, of the Constitution. They further aver that [the act under attack is an assumption of judicial power, and that] payment of this claim will result in depriving them of their property in violation of Article I, Section 1, [of] the Declaration of Rights; finally, that such payment will be in the nature of a gratuity to Booth & Flinn, Ltd."

The opinion sustaining the demurrer then proceeds as follows: "Article III, Section 7, of the Constitution, prohibits the enactment of 'any local or special law regulating the affairs of counties'" The Act of 1917 [supra] in terms applies to all counties in the State, and, therefore, it is presumptively a general statute. That but one county happens to be affected by its provisions, even if such be the fact, is of no moment. Every county might have availed itself of the provisions of the Act of 1909, and that but one did so is a mere circumstance in no way affecting the generality of the Act of 1917. The act does not authorize a county to pay any one a specified amount; it gives authority to pay for [work] actually done [in any and all instances falling within the remedial provisions of the legislation]. The amount [in each case] must be ascertained by the courts in the same manner as they dispose of any other controversy. There happens to be no dispute as to the amount [in the present case], because there is no averment in the bill which raises a question of that kind. In our opinion this is not a local or special law": *Swartz v. Carlisle Boro.*, 237 Pa. 473, 477; *Carlstadt National Bank v. Borough of Hasbrouck Heights*, 83 N. J. L. 383, 386; *State ex rel. Board of Education v. Brown*, 97 Minn. 402, 404, 408, 416, 422.

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We may add to the views just quoted from the opinion of the court below that *Sample v. Pittsburgh*, 212 Pa. 533, 543, 544, cited by appellants, is not a case in point. There it was perfectly apparent that the act assailed was intended to apply only to a particular locality, for, as said in that case, it is a matter of general knowledge, of which the courts will take judicial notice, that only one county in the State contains two contiguous cities "separated by a stream"; hence it is to be presumed that the legislature acted upon such knowledge and intended the statute in question to apply to that one county alone. In the present instance, we do not know in how many parts of the state the Act of 1917, *supra*, may apply, and it cannot be presumed that the lawmakers had any greater knowledge upon the subject than we possess or that they enacted the law to fit any special case. Indeed, all presumptions must be drawn in favor of the validity of the act and the propriety of the legislative intention: *Sugar Notch Boro.*, 192 Pa. 349, 355; *Penna. R. R. Co. v. Riblet*, 66 Pa. 164, 169; *Likins's Petition* (No. 1), 223 Pa. 456, 459-60; *Com. v. Hyneman*, 242 Pa. 244, 246-7. The numerous cases cited in *State ex rel. Board of Education v. Brown*, *supra*, from other jurisdictions, show how loath the courts are to hold curative acts to be special or local legislation when they are drawn to "apply to all persons, things or subjects affected by the conditions to be remedied," as is the statute now under consideration.

The court below goes on to say: "Art. III, Sec. 11, of the Constitution, prohibits legislation giving extra compensation 'to any public officer or contractor after services shall have been rendered or contract made,' or 'providing for the payment of any claim against the Commonwealth without previous authority of law.' As this claim is not against the Commonwealth, the latter part of the section has no application. No extra compensation is given to any one by the terms of the Act of 1917 , and the claim [at bar] is not within the

mischief against which the above provision is a protection." The correctness of these views will be made plain hereinafter, when we consider the character of the claims provided for and the nature of the remedy afforded by the Act of 1917, *supra*.

Further on the opinion states: "Art. IX, Sec. 7, of the Constitution prohibits the legislature from authorizing the appropriation of money or the loaning of credit by a county [city, etc.] to any corporation or individual; the payment of the present claim does not violate that section in any sense." We may add to this brief quotation that the Act of 1917, *supra*, does not treat the obligations with which it deals as gratuities, such as contemplated by this constitutional inhibition, but as moral obligations that have ceased to be legal ones merely because of defects in the statute which authorized them. If the authority for payment contained in the act before us is a violation of this section of the Constitution, then all curative acts and ordinances which direct or authorize payments by municipalities for work done without previous authority of law, would be void; which every one knows not to be the case. We mention ordinances, for, of course, municipalities cannot lawfully do those things which the legislature is prohibited by the organic law from authorizing them to do; and Section 5 of the Act of May 23, 1874, P. L. 230, which empowers the cities of the Commonwealth, by a two-thirds vote of their councils, to pass ordinances providing for payment of honest claims against them incurred "without previous authority of law" but supportable as moral obligations, has more than once been upheld in practical application by this court: see *Vare v. Walton*, 236 Pa. 467, 469-70; *Com. v. Walton*, 236 Pa. 220; *Cunningham v. Dunlap*, 242 Pa. 341, 345.

The next matter enumerated for consideration is briefly but correctly disposed of in these words: "The payment of [the present] claim will not be in violation of Sec. 1 of the Declaration of Rights; this pro-

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vision relates to the acquisition, possession, and protection of property. None of the property of the complainants will be taken by anything proposed to be done. They have no [special] title to any moneys in the county treasury; therefore, the payment of this claim cannot in any event deprive them of private property." We have held frequently that the legislature may lawfully impose a tax to pay the expense of a public improvement which had been made under invalid authority, and that an assessment for that purpose is not a taking or deprivation of property within the meaning of the Constitution. If power to make such an assessment exists, it follows that there is an equal right to pay for the improvement from moneys in the public treasury raised by general taxation or otherwise: *Schenley v. Com.*, 36 Pa. 29, 57; *Donley v. Pittsburgh*, 147 Pa. 348; *New Brighton Boro. v. Biddell*, 14 Pa. Superior Ct. 207, 211.

The opinion of the court below deals as follows with the last point in controversy: "Neither is this Act of 1917 an assumption by the legislature of judicial powers, as is argued by the complainants. The contract to which they are now objecting was not before the court in the previous litigation, except incidentally. The actual controversy was as to the constitutionality of the Act of 1909, without regard to anything that had been done thereunder; hence, there was no decision upon the contract at all. Nothing could have been decided except a constitutional question. The Act of 1917 does no more than any other curative act; it effectively authorizes [within the restrictions of the statute] what had previously been defectively authorized, and there is no attempt to decide any judicial question. . . . The act. . . . is undoubtedly curative legislation; but the legislature is not prohibited from passing such acts, if the power to enact the [substance of the prior] defective legislation existed. If there was such authority, that which was declared invalid may be validated by a subsequent statute: *Donley v. Pittsburgh*, 147 Pa. 348. 'The authority

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of the legislature to ratify whatever it might have authorized is beyond question': *Devers v. York City*, 150 Pa. 208. That there was power to authorize counties to construct highway tunnels within cities, ... cannot be denied. Indeed, in the decision declaring the Act [of 1909, *supra*] unconstitutional, the Supreme Court says [p. 92], 'It is not contended that the general assembly lacked authority to make these radical changes, but that the title here in controversy is not sufficiently clear to give notice of an intention so to do': *County Commissioners' Petition*, 255 Pa. 88. Thus the [curative] Act of 1917, *supra*, is within the principle above enunciated."

The complainants attack practically all of the above quoted views and conclusions of the court below; but their chief contentions center around the thought that, when the Act of 1909, *supra*, was before us on the former appeal (255 Pa. 88), we then adjudged the present contract invalid, and, therefore, the legislature could not subsequently enact a law declaring to the contrary, without unduly encroaching upon judicial prerogatives; and they argue that the Act of 1917, *supra*, is such an encroachment. This position is faulty for two reasons. In the first place, while the result of our former adjudication was to render ineffectual the tunnel contract here involved, yet that matter was not then in litigation and we passed no direct judgment thereon. Next, the Act of 1917, *supra*, does not attempt or even pretend to validate the contracts therein referred to, in the sense of making them effective, or establishing them as subsisting binding obligations, according to their tenor, nor does the act undertake to declare the proceedings underlying such contracts legal, after we had ruled otherwise. On the contrary, the legislation in question is based upon a recognition of the non-enforcibility of these contracts, and they are treated therein as mere moral obligations. The whole statute is drawn upon the theory that the relief thereby afforded is made necessary by the illegality of the before-mentioned prior legislation and

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all proceedings thereunder. True, at one point, it does state that the contracts are made "valid and binding," but this language is immediately qualified by the remedial or curative part of the statute, which provides that recovery thereunder can be had only for work done before the unconstitutionality of the former legislation, upon which these contracts rest, was established, and that (as quoted hereinbefore) "nothing in this act shall be so construed as to make valid any contract except to the extent that work was actually done and performed prior to the date on which said [legislation] was declared unconstitutional." In other words, the essence of the law under attack is simply a legislative recognition that, when in any instance public work of the character described in the statute shall have been done under a contract having the color of validity, by reason of its authorization by act of assembly, and such act shall subsequently be declared unconstitutional, these circumstances shall give rise to a moral obligation, by virtue of which the statute requires the county which ordered the work in question to fulfil its promise of payment to the extent of any actual performance of the contract, up to the time that operations thereunder were brought to a stop by the adjudication of the invalidity of the prior authoritative legislation. Briefly stated, the Act of 1917, *supra*, merely turns into enforceable demands what the legislature in its wisdom saw fit to consider moral obligations. This course has been countenanced repeatedly as curative legislation; and, in the present instance, it is far from declaring the class of contracts referred to in the act before us to be valid, subsisting, legal obligations, to be enforced according to their tenor, which, of course, the legislature could not do without effectually remedying the faulty foundation upon which they rest.

The complainants contend, however, that to make the Act of 1917, *supra*, curative legislation, in the proper legal sense of that term, the present statute would have

to correct the errors of the prior authorizing act, which was declared unconstitutional; and, as a prerequisite to any recovery, even of money earned before the declaration of the invalidity of the other statute, the contractors would have to proceed with their work on a new and valid authorization under a curative act so drawn. Notwithstanding the able argument of counsel for appellants, as already indicated, we do not sustain these contentions. No matter how much support therefor may be found in other jurisdictions, they are not in accord with the trend of authority, particularly in Pennsylvania; for, in several instances, we have upheld the validity of curative legislation practically like that now under attack.

Donley v. Pittsburgh, 147 Pa. 349, is cited by appellants as an adjudication upon curative legislation correct in form; but it might better have been relied upon by the appellees, for an examination shows that the act in that case (May 16, 1891, P. L. 71) expressly validates and gives a right of recovery for improvements already made under old and void legislation; and, as a matter of fact, the proceedings there were to collect under the curative act for work which had been completed under a void statute. There, as noted in the opinion of this court, certain public improvements were made under legislation which was subsequently declared unconstitutional; "this left the city without power to collect the cost of the improvements completed and in course of construction," and the statute attacked was passed to remedy this difficulty. The opinion in that case then states: "It was urged that this [curative] act does not apply, because the improvements in question were made under void acts of assembly, and without any authority whatever. If they had been made under competent authority, or a valid act of assembly, there would have been no need of curative legislation. The work having been done under void authority, and the property owners having received the benefits of the street improve-

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ments, the legislature had the clear right to legalize what it might previously have ordered; that the legislature has the power to pass such remedial legislation is settled by abundant authority." If the law-making body has the right to enforce payment by property owners of claims such as the one involved in this Donley case, and we there decide it has such right, it has equal power to authorize payment by the counties of claims for work done in and about attempted public improvements, as ordained by the statute before us in the present case.

Another and perhaps even stronger authority for the appellee than the Donley case is *Chester City v. Black*, 132 Pa. 568. There a public improvement had been made under and by virtue of legislation which was subsequently declared to violate the Constitution. An act (May 23, 1889, P. L. 272) "was passed to meet this difficulty"; it provides for the assessment of the cost of work done under prior void statutes, and is expressly entitled, "An act authorizing assessments and reassessments for the costs of local improvements already made or in process of completion....." No provision is therein made for continuing or completing work already started under void acts, the curative statute being concerned entirely with the method of paying and recovering for work already done. The defendant was assessed, under the curative act, for part of the cost of an improvement which had been authorized and completed under the void act. He resisted payment on the ground that the curative act was unconstitutional. We held that, the original authorization and proceedings for the collection of the assessment being abortive, since the legislature had power to authorize the work and assessment, the curative act was valid and recovery could be had thereunder. Thus it may be seen that, in the case just cited, the defects in the void statutes were not attempted to be cured by the remedial act, but work done under the prior legislation was ratified and provision

made for the assessment and collection of the cost thereof.

The theory upon which curative acts of the nature of the one now before us have been sustained is briefly this: where the legislature has power to enact the substance of the matter covered by a statute which has been declared void because unconstitutional in form (as in the case at bar), it may subsequently ratify and make legal anything done under the prior void legislation which it might previously have authorized in due form: *Devers v. York*, 150 Pa. 208, 213.

In our previous case (255 Pa. 88) we decided the Act of 1909, *supra*, unconstitutional because of defects in title; then the Act of 1917, *supra*, was passed, saying that, where improvements had been made under the void act in question, the county affected shall pay the price of such portion thereof as was completed at the time the work was brought to a stop by the declaration of the invalidity of the prior legislation. It being within the power of the law-making body, in due and proper form, originally to have authorized the work in question, there can be no doubt of the legislature's right subsequently to ratify what it might have previously authorized, and this it does by the act now before us.

In addition to the authorities already cited, see also on the general subject in hand, *Marshall Avenue*, 213 Pa. 516; *Mellick v. Williamsport*, 162 Pa. 408; *Bailey v. Philadelphia*, 167 Pa. 569, 573; *Rader v. Union Township*, 39 N. J. L. 509, 519, 520. As to *Kreusler v. McKees Rocks School District*, 256 Pa. 281, it is sufficient to say the facts there are essentially different from those at bar and our decision in that case rests upon rules of law not here involved; the two cases in no sense conflict with each other. The other Pennsylvania cases cited by appellants do not rule the present one.

The assignment of error is overruled and the decree affirmed, at the cost of appellants.

Vickroy et al. v. Ferndale Borough.

Boroughs—Eminent domain—Parks—Appropriation of land—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus—Courts—Power over process.

1. Any court having jurisdiction to hear and determine civil cases has control over its own processes of execution, but such power may not be exercised arbitrarily but only when sufficient legal reason is shown for the court's interference.

2. The right of boroughs to appropriate land for park purposes is purely statutory and can be exercised only as the terms and conditions of the statutes have been complied with.

3. Under Section 3 and 4 of the Act of May 14, 1915, P. L. 312-412, giving boroughs the right to appropriate land for public park purposes, a borough will not be liable for the value of land appropriated where the value of such land exceeds one and one-half mills on the dollar of valuation of all property offices, professions, and persons in the borough upon which county taxes are rated and levied, except as the appropriation is approved by a majority vote of the borough.

4. Land appropriated by a borough ordinance for park purposes exceeded in value one and one-half mills on the dollar of the valuation of all property, offices, professions and persons in the borough, and such appropriation was not approved by a majority of the borough electors. The borough was without funds to pay the amount of the award, from which no appeal had been taken and upon which judgment had been entered. The persons whose land had been taken issued a mandamus execution against the borough. At the instance of the borough the court made an order directing the borough to pay on account of the award "annually such an amount as will not exceed a total of one and one-half mills on the dollar, in three years, calculated on the basis of the valuation of property in said borough at the rate as may from time to time be assessed for county purposes," the apparent purpose of such order being to make the writ effective for only so much in any one term of three years as the defendant borough could have been compelled to pay had the indebtedness incurred not been in excess of one and one-half mills on the dollar of the assessed valuation of the borough. *Held*, (1) the question of the appropriation of the property not having been submitted to the electors of the borough, the ordinance making the appropriation imposed no liability upon the borough,

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and the judgment was not ripe for final process to enforce its payment, (2) while it would not be in the power of the court to strike such judgment from the record the court has power to open such judgment for purposes of defense and in the present case it would be a clear abuse of discretion not to do so, and (3) the execution should be vacated and set aside.

Submitted Sept. 25, 1917. Appeal, No. 120, Oct. T., 1917, by plaintiffs, from order of C. P. Cambria Co., March T., 1916, No. 75, modifying judgment and mandamus execution, in case of Sarah A. Vickroy and John S. Kenney, Attorney in fact for Helen V. Austin, Emma Vickroy Suter, Laura H. Vickroy, Mary H. West, Edward A. Crueger and Ida Crueger v. Borough of Ferndale. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Reversed.

Petition for modification of judgment and mandamus execution. Before STEPHENS, P. J.

The opinion of the Supreme Court states the facts.

The court entered the order set forth in the opinion of the Supreme Court. Plaintiffs appealed.

Error assigned was the order of the court.

Frank P. Barnhart and *A. Lloyd Adams*, submitted for appellants.

D. P. Weimer, submitted for appellee.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

By ordinance enacted September 8, 1915, the municipal authorities of the Borough of Ferndale, Cambria County, under the provisions of the Act of May 14, 1915, P. L. 312, appropriated certain real estate belonging to the appellants for park purposes. On the 13th of December following appellants filed a petition praying the court to appoint viewers to assess damages for the land

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so appropriated. On March 6, 1916, the viewers so appointed filed their report in which there was awarded the appellants the sum of \$3,700 for damages. No exceptions were filed to this report, nor was any appeal taken therefrom, and on April 6th following the report was confirmed absolutely. On April 21st following judgment was entered on the report in favor of the appellants for the sum awarded. In default of payment of this judgment appellants caused to be issued a mandamus execution against the borough requiring the payment of said judgment out of any unappropriated moneys, or if no such money, then out of the first moneys that should be received by the borough. Thereupon the borough, by its municipal authorities, filed its petition setting forth the facts we have above stated, with these additional facts: (1), that the general borough law under which the appropriation of appellants' land was made for park purposes—Act of May 14, 1915, P. L. 312, Chapter IX, p. 412, Article I, Sections 3 and 4—restricts the amount of indebtedness a borough may incur to a sum within one and one-half mills on the dollar of the assessed valuation of the property, offices, professions and persons in the borough upon which county taxes are rated and levied, except with the consent of a majority of electors obtained in the manner provided for in Section 4; that is to say, when an expenditure is contemplated which will exceed such limitation, "the council shall cause the question of such appropriation, purchase or leasing to be submitted to the electors of the borough at the municipal or general election next occurring after the expiration of forty days from the date of such ordinance"; (2), that the amount of damages awarded by the viewers for appropriation of appellants' land, namely, \$3,700, exceeds one and one-half mills on the dollar of the assessed valuation; (3), that at the time the whole amount of money unappropriated belonging to the borough was \$30.08, and concluded with asking that the court mould the judgment entered and execution so as to permit the

borough to pay the judgment out of the moneys unappropriated or that might come into the hands of the treasurer which may not have been previously appropriated, not to exceed, however, one and one-half mills on the assessed valuation of the borough in any period of three years. To this petition plaintiff answered, not traversing any of the material facts alleged in the petition, but simply denying the power or jurisdiction of the court to make such order. On January 1, 1917, without filing any opinion, the court made the following order: "Now, January 1, 1917, upon due consideration the rule heretofore issued is discharged and the order in the above writ of mandamus execution entered to No. 5, September Term, 1916, is modified as follows: The defendant, the Borough of Ferndale, is directed to pay on account of the sum of \$3,700 and interest thereon as awarded to the plaintiff, Sarah A. Vickroy, on account of appropriation of land for park purposes by the Borough of Ferndale, annually such an amount as will not exceed a total of one and one-half mills on the dollar, in three years, calculated on the basis of the valuation of property in said borough at the rate as may from time to time be assessed for county purposes." The appeal is from this order.

We take the case simply as it is presented on the record before us. It may well be that there are more serious questions underlying than any upon which issue has been joined in this appeal, but if so they must await determination until such time as they come properly before us. At this time we have nothing to decide except the right and power of the lower court out of which the mandamus issued to modify it in the way it did. The pleadings raise no question as to the regularity of the judgment on which the mandamus execution issued; nor was the order of the court based on any supposed infirmity of the judgment, but rather, on the contrary, it assumes the validity of the judgment and goes no further than to control the execution process issued thereon.

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The questions thus avoided are not subjects of inquiry in the present controversy, however much upon their determination the merits of this case may largely depend in the final adjustment.

It is unquestionable that any court having jurisdiction to hear and determine civil causes has control over its own processes of execution. This power, however, may not be exercised arbitrarily, but only when sufficient legal reason is shown for the court's interference. The order made in this case is what it plainly imports—an amendment of the writ of execution that had been issued,—and the court has not left us in doubt as to its purpose, which was to make the writ effective for only so much in any one term of three years as the defendant borough could have been compelled to pay had the indebtedness incurred not been in excess of one and one-half mills on the dollar of the assessed valuation of the borough.

It is a conceded fact that the value of appellants' land or rental thereof exceeded one and one-half mills on the dollar of the assessed valuation of all property, offices, professions and persons in the borough upon which county taxes are rated and levied. Another fact of which the same may be said is that such valuation or assessment having been ascertained, the question of the appropriation of property was not submitted to the electors of the borough as required by the act of assembly. From the latter it results that the judgment on which this execution issued, though taken *secundem legem*, is not a judgment ripe for final process to enforce its payment. The right of boroughs to appropriate land for park purposes is purely statutory, and it follows that said right can be exercised only as the terms and conditions of the statute have been complied with. The act under which the appropriation in this case was made—Act of May 14, 1915, P. L. 312—after giving to boroughs the right to appropriate land for public park purposes, provides, in Chapter IX, p. 412, Article I, Section 4, that

“whenever any borough shall by ordinance provide for the appropriation, purchase or leasing of private property for the purposes aforesaid and the value of such property or rental thereof shall alone, or when added to the amount of liability incurred for any of the purposes aforesaid within the preceding three years, exceed one and one-half mills on the dollar of valuation as provided in preceding section, the council shall cause the question of such appropriation, purchase or leasing to be submitted to the electors of the borough at the municipal or general election next occurring after the expiration of forty days from the date of such ordinance.” The four following sections of the act provide for public notice to the electors of the proposed submission and the form of the question to be submitted; the one next following provides that “no such question determined negatively by the voters shall be again submitted until one municipal or general election shall intervene.” It requires no argument to show that no liability on the part of the borough for this appropriation by ordinance of appellants’ land could result, except as the appropriation was subsequently approved by a majority vote of the borough electors in the manner provided for by the act. It was the right of eminent domain that was here attempted to be exercised. This is not a question of enforcing a strict construction of the act of assembly; in plain, unambiguous language, admitting of no two constructions, the act makes it a condition of final appropriation when its value exceeds the one and one-half mills on the dollar of the assessed valuation of the borough, that the taking be approved by a majority of the electors at a vote taken in the way prescribed. It is admitted in the pleadings that no such vote was taken. How, then, could liability result to the borough? But here we have a judgment, regular on its face and entered in accordance with the terms of the act as provided by Section 4 of Chapter IX, 412, which reads as follows: “The final confirmation of the report (of viewers) shall operate as a judgment

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against the borough in favor of the party to whom damages have been awarded by the report, or by so much of the report as is confirmed. Interest is allowed on such judgment from the date of filing the report." While it would not be in the power of the court to strike such judgment from the record, yet it would unquestionably be in the power of the court to open such judgment for purposes of defense, and upon the allegation of such facts as are here admitted, properly supported, it would be a clear abuse of discretion not to do so. For present purposes no further reference to the judgment is required, our only object in referring to it was to show that it is at least assailable, and does not in itself show such clear legal right to money claimed and a corresponding duty on the part of the borough as would warrant a mandamus execution for its collection. Certainly an application made to the court for a mandamus execution under the facts exhibited here would be refused. With the power of the court to control its processes of execution, why should it be denied the power of vacating a process which it would have been compelled to deny had it been asked for? And this is what should have been done in this case, in order to prevent the process of the court from being abused.

The appeal is sustained; the order of the court is reversed and the mandamus execution is vacated and set aside, at the cost of appellants.

Bowman, Appellant, v. Berkey et al.

Judgments—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments—Discretion of court—Rule to strike off judgment—Laches—Res adjudicata.

1. Although the addition of a seal after the signature of the maker of a note is such a material alteration as will avoid the instrument, an alteration by a third person, without the knowledge

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or consent of the party to the writing, cannot in any way affect the holder's right or impair the validity of the instrument in its original form.

2. In proceedings to open a judgment, entered upon a judgment note, evidence showing alterations subsequent to the execution of the instrument, upon which the judgment is based, is ample to meet the burden imposed upon the defendant by law to make a good defense by evidence sufficient to justify submission to the jury and to sustain a verdict for defendant if believed by the jury.

3. The uncontradicted testimony of plaintiff and her witnesses to the effect that the addition of the seal was not made by her or by any one for her, at her request, does not shift to defendant the burden of showing who was responsible for its presence on the note.

4. When an erasure, alteration or interlineation appears on the face of an instrument, there is primarily a presumption that the change was made before execution. If the alteration does not appear to be beneficial to the party offering the writing or if it is opposed to his interest, or if made with the same pen and ink and in the same handwriting as the body of the writing, this presumption remains unchanged. Where, however, the alteration is material, is beneficial to the party offering the writing, or if there be a change on the face of the instrument which appears suspicious, the presumption disappears and the burden is on the party offering the writing to explain the alteration to the satisfaction of the jury.

5. In proceedings to open a judgment entered upon a judgment note, on the ground that, after the execution of the note, a seal had been added thereto, where the plaintiff neither admits nor directly denies the subsequent alteration but states that no alteration was made by her or for her with her authority, such testimony is wholly insufficient to enable the court to say as a matter of law that she has met the burden and satisfactorily accounted for the altered condition of the writing, and, as in such case the real dispute is not so much as to the fact of adding the seal as by whom added, such question is one of fact for the jury, and the court did not err in opening the judgment.

6. In such case the fact that a motion to strike the judgment from the record had been dismissed, was not *res adjudicata* of the question involved as the mere fact that the seal was in a different handwriting from that of the maker of the note, was not such an irregularity as would warrant the striking off of the judgment.

7. In such case the defendant was not guilty of laches in taking the rule to open the judgment where it appeared that the judgment was entered on November 5, 1914, that a rule to strike off the judg-

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ment was taken on November 28th following, and was discharged on September 1, 1916, and on September 14, 1916, a petition to open the judgment was filed.

Argued Sept. 25, 1917. Appeal, No. 125, Oct. T., 1917, by plaintiff, from order of C. P. Cambria Co., Dec. T., 1914, No. 397, opening a judgment, in case of Polly A. Bowman v. Jerry Berkey and W. S. Krise. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHISKEER, FRAZER and WALLING, JJ. Affirmed.

Petition for rule to open judgment. Before O'CONNOR, J.

The opinion of the Supreme Court states the facts. The court opened the judgment. Plaintiff appealed.

Error assigned was the order of the court.

Frank P. Barnhart, with him *Morgan W. Evans*, for appellant.

Harry Doerr, with him *Tillman K. Saylor*, for appellees.

OPINION BY MR. JUSTICE FRAZER, January 7, 1918:

The court below made absolute a rule to show cause why judgment entered against defendant under a warrant of attorney contained in a note should not be opened. Plaintiff appealed. The question for our determination is whether or not the action of the court was a proper exercise of its discretion under the evidence produced: *Kelber v. Pittsburgh National Plow Co.*, 146 Pa. 485; *Wright v. Linhart*, 243 Pa. 221.

Under date of April 1, 1908, Franklin B. Ött, Jerry Berkey and W. S. Krise, executed a note to plaintiff for \$2,500, payable to the order of plaintiff and containing a warrant of attorney to confess judgment ending with the words "Witness our hand and seal" and followed by the signatures of the above named persons. The petition

to open the judgment alleged a material alteration to the note since its execution by the addition of the word "seal" after the name of Krise. This was denied in the answer, and, in the depositions taken under the rule Krise testified the word "seal" was not on the paper opposite his name at the time of affixing his signature and had been added since without his knowledge or consent. The testimony of other witnesses, tending to corroborate Krise, was in effect that an inspection of the writing and the condition of the ink indicated the addition of the word "seal" subsequent to the signing of the note and about the time of entering judgment, and, further, that the word "seal" was not in the handwriting of Krise.

Plaintiff denied the seal was placed on the note subsequent to its execution by her or by any person at her request or on her behalf, stating however her inability to say whether the seal was there at the time Krise attached his signature. Plaintiff's husband, who transacted business for her and saw the note executed, also admitted not knowing whether a seal appeared opposite the name of Krise at the time he signed or whether the latter added it, but testified the note with the seal appeared to be in the same condition as when signed by the parties and he knew nothing of the alleged alteration and did not authorize any one to make or change the obligation in any respect.

Although the addition of a seal after the signature of the maker of a note is such a material alteration as will avoid the instrument (*Biery v. Haines*, 5 Whar. 563) it is, however, a familiar rule of law that an alteration by a third person, without the knowledge or consent of the parties to the writing, cannot in any way affect the holder's right, nor impair the effect of the instrument in its original form: *Kountz v. Kennedy*, 63 Pa. 187; *Robertson v. Hay*, 91 Pa. 242.

While in a proceeding to open a judgment evidence given by defendant showing alteration subsequent to execution of the instrument upon which the judgment is

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based, is ample to meet the burden imposed by law upon him to make a good defense by evidence sufficient to justify submission to the jury and to sustain a verdict for defendant, if so found by the jury, it is contended here that the uncontradicted testimony of plaintiff and her witnesses to the effect that the addition of the seal was not made by her or by any one for her, at her request, shifted to defendant the burden of showing who was responsible for its presence on the note.

The rule in this class of cases is that when an erasure, alteration or interlineation appears on the face of an instrument, there is primarily a presumption in favor of innocence and that the change was made before execution: *Simpson v. Stackhouse*, 9 Pa. 186; *Robinson v. Myers*, 67 Pa. 9. If the alteration does not appear to be beneficial to the party offering the writing, or if it is opposed to his interest, or if made with the same pen and ink and in the same handwriting as the body of the writing, this presumption remains unchanged. If, however, the alteration is of a material part and is beneficial to the party offering the writing, or if there is a change on the face of the instrument which appears suspicious, the presumption disappears and the burden is on the party offering the writing to explain the alteration to the satisfaction of the jury: *Henry's Penna. Trial Ev.*, page 184, Section 197, and cases cited. In the present case the alleged alteration is material and beneficial to the party offering it, as the seal prevents the running of the statute of limitations as applicable to an unsealed note. According to the testimony of defendant, the addition is in a different handwriting, and was made at a time subsequent to the signing of the paper. While plaintiff does not admit the subsequent alteration, defendant's testimony is not directly denied, plaintiff merely disclaiming all knowledge of the matter, contenting herself with the statement that no alteration was made by her or for her with her authority. Such testimony is wholly insufficient to enable the court to say as matter of law

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that she has met the burden and satisfactorily accounting for the altered condition of the writing. As the evidence at present stands, the real dispute in the case is not so much as to the fact of adding the seal as by whom added, that is, by Krise or by some other person, either with or without his authority, and this question is one of fact for the jury: *Martin v. Kline*, 157 Pa. 473. Under these circumstances, the court did not abuse its discretion in opening the judgment.

There is no merit in the contention that the petition to open was *res adjudicata* of the question involved because of the dismissal of a previous rule taken to strike off the judgment. A judgment can be stricken off only for irregularities appearing on the face of the record. In the present case, assuming the seal is in a different handwriting, and appeared on its face to have been written subsequent to the other signatures, this is not an irregularity warranting the striking off of the judgment. The seal may have been written by a third person before the note was signed or subsequently added with the consent of all the parties. Therefore, no adequate reason exists for making absolute that rule. While it is true the court might have treated the rule as one to open judgment and proceeded accordingly (*Williams v. Notopolos*, 247 Pa. 554) it was not bound to do so, and, in absence of a motion to amend made by defendant, the rule was properly discharged, and such order is not in any sense a decision on the merits pleadable in bar of the present proceedings.

Nor can we agree with the contention that defendant was guilty of laches in taking the present rule. Judgment was entered November 5, 1914, and, on November 28th following, a rule was granted to show cause why the judgment should not be stricken from the record, which rule was discharged September 6, 1916, and September 14, 1916, a petition to open judgment was entered and rule granted thereon. This state of the record does not indicate laches on the part of defendant.

The judgment of the court below is affirmed.

**Pittsburgh Railways Company et al., Appellants,
v. Borough of Carrick et al.**

Boroughs—Street railways—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches—"Switches"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough—Laches—Acquiescence—Ratification—Bill in equity—Injunction.

1. Laches may be imputed to the Commonwealth or to a municipality as well as to an individual.

2. Where the tracks of a street railway company have occupied a township road pursuant to authority of the township supervisors for a period of fourteen years, at the end of which time a borough was erected embracing the road in question, the fact that the railway's right to occupy the road was not challenged until twelve years thereafter, is strong evidence of acquiescence on the part of the borough authorities.

3. The manner in which the consent of so elementary an organization as a township, where it is requisite, is given, is not so important as that the fact of its being given should clearly appear. Although action should be taken by means of a formal resolution, duly recorded in the minutes of the meeting, nevertheless, where the consent of the supervisors is evidenced by a written instrument duly signed and acknowledged by them, their failure to have a minute of the transaction entered upon their records cannot operate to invalidate the consent.

4. Though the obtaining of a municipality's consent to occupy any of its streets be a condition precedent to the lawful exercise of the power to do so by a railway company, nevertheless where the consent has not been obtained in advance, there may be a subsequent ratification.

5. While strictly speaking a switch is a mechanical arrangement of movable parts of rails for transferring cars from one track to another, the word is commonly used as a synonym for siding and turnout.

6. The rule that, even where not expressly given, the right to build switches and sidings is included as a necessary incident to the grant of the right to build a railroad, is applicable to street railways as well as to steam railroads.

7. Borough authorities may exercise reasonable control over the manner in which switches are laid or sidings constructed.

8. Switches and sidings should be laid so as to cause the least

possible inconvenience to traffic, and if there be any irreconcilable controversy upon this subject, a court of equity will have jurisdiction to determine what is a reasonable occupancy of the street under the circumstances.

9. On the hearing of a bill in equity brought by a street railway company to enjoin a borough from interfering with the laying of switches connecting complainant's tracks in the highway with its car barn, it appeared that a township in 1890 granted authority to complainant to lay "a single or double track railway with the necessary sidings, turnouts and switches," and to maintain, operate and use such railway on a certain road within its limits. In 1904 a borough was created including such road within its limits. In 1905 the company paved part of the street on either side of its tracks at considerable cost. In 1916 the railway attempted to lay switches, wholly on the cartway of the street and on its own sidewalk, from its main tracks to an abutting lot on which it had erected a car barn. The borough authorities denied the right to construct such switches and threatened to prevent its exercise. *Held*, (1) the complainant company had the right and authority to lay sidings and switches, and (2) the decree of the lower court dismissing the bill was reversed, the bill reinstated and the record remanded with directions that an injunction be issued.

10. In such case the fact that after the borough was incorporated it widened the road by adding five feet upon either side is immaterial.

Breen v. Pittsburgh, Harmony, Butler & New Castle Ry. Co., 220 Pa. 612, distinguished by the fact that there the rights of an abutting owner were affected.

Supreme Court, Practice—Statement of questions involved.

11. The only questions that will be considered on appeal are those presented by the statement of the questions involved.

Argued Oct. 15, 1917. Appeal, No. 146, Oct. T., 1917, by plaintiffs, from decree of C. P. Allegheny Co., Oct. T., 1916, No. 2056, in equity, dismissing bill in equity for injunction in case of Pittsburgh Railways Company, Consolidated Traction Company and The Suburban Rapid Transit Street Railway Company, Corporations of Pennsylvania, v. The Borough of Carrick, a Municipal Corporation, and Charles F. White, J. A. Haupt, John McCarthy, Harry Beardshaw and John Seiferth, Members of the Council of the Borough of Carrick. Be-

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fore BROWN, C. J. POTTER, MOSCHZISKEB, FRAZER and
WALLING, JJ. Reversed.

Bill in equity for injunction to restrain a borough from interfering with operations of complainant company in laying switches connecting its tracks in the highway with its car barn. Before SHAFER, P. J.

The facts appear by the opinion of the Supreme Court.

The lower court dismissed the bill. Plaintiffs appealed.

Error assigned, among others, was in dismissing the bill.

E. W. Smith, of Reed, Smith, Shaw & Beal, with him A. W. Robertson, for appellants.—The grant of the right to operate a railway carries with it the right to construct necessary sidings, turnouts and switches: *Vernon Township v. United Natural Gas Co.*, 256 Pa. 435; *Meixell v. Northampton Central Street Ry. Co.*, 7 Northampton County Reports 274; *Jefferson County v. Slagle*, 66 Pa. 202; *Pennsylvania Railroad v. Montgomery County Passenger Railway*, 167 Pa. 62; *Scranton Traction Company v. Delaware & Hudson Canal Company*, 1 Superior Ct. 409; *Beaver Borough v. Beaver Valley Railroad Co.*, 217 Pa. 280; *The Cleveland & Pittsburgh Railroad Co. v. Speer*, 56 Pa. 325; *Borough of Pottsville v. People's Railway Company*, 148 Pa. 175; *Black v. The Philadelphia & Reading Railroad Co.*, 58 Pa. 249.

The rule as to the construction of switches, turnouts and sidings by railroads is applicable to street railways: *Rafferty v. Central Traction Co.*, 147 Pa. 579.

John C. Bane, with him William M. Ewing, for appellees.—The power of the borough to give or refuse consent to the occupation of its streets is unqualified: *Minersville Borough v. Schuylkill Electric Railway Company*, 205 Pa. 394; *West Chester Borough v. Postal Telegraph-*

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Cable Company, 227 Pa. 384; Carlisle & Mechanicsburg Street Ry. Company's App., 245 Pa. 561; City of McKeesport v. McKeesport and Reynoldton Passenger Ry. Company, 252 Pa. 142.

The written consent given by the township supervisors to complainants to operate its railway on the road in question, no minute or record thereof having been made in the proper books of the township, was not an official act and is a nullity: *Pennsylvania Railroad v. Montgomery County Passenger Ry.*, 167 Pa. 62; *Tamaqua and Lansford Street Ry. Company v. Inter-County Street Ry. Company*, 167 Pa. 91; *Union Street Ry. Company v. Hazleton and North Side Electric Ry. Company*, 3 D. R. 785.

The term "sidings, turnouts and switches" in the alleged township grant must be construed to mean such sidings, turnouts and switches as were necessary to the operation of the railway within the limits of the road: *Breen v. Pittsburgh, Harmony, Butler and New Castle Ry. Company*, 220 Pa. 612.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

This was a bill in equity filed by the Pittsburgh Railways Company, the Consolidated Traction Company, and the Suburban Rapid Transit Street Railway Company, against the borough of Carrick and five individuals, members of the council of that borough, for the purpose of preventing the defendants from interfering with the operations of the railways company in laying switches connecting its tracks in the highway with its car barn. A preliminary injunction was granted, which, upon final hearing in the court below, was dissolved, and the bill dismissed. Plaintiffs have appealed.

The facts, practically undisputed, appear in the findings of the trial judge, substantially as follows: The Suburban Rapid Transit Street Railway Company was incorporated on September 28, 1886, and by various mergers and leases has become part of the system of the

Pittsburgh Railways Company, and is operated by it. By an agreement in 1889, and a deed in 1893, the Birmingham and Brownsville Macadamized Turnpike Road Company granted to the Suburban Rapid Transit Company a right of way for a street railway, with necessary turnouts and switches, on its turnpike road, which it operated as a toll road in Baldwin Township, the road being of the width of fifty feet. On June 17, 1890, the two supervisors of Baldwin Township granted to the street railway company the right to lay a single or double track railway with the necessary sidings, turnouts and switches, and to use electricity as its motive power, and to put up such poles and wires as were necessary for its overhead system, along a number of roads in the township, including the Brownsville turnpike. The Suburban Rapid Transit Railway Company constructed and operated a single track street railway on the Brownsville road before 1890, which it or its successors afterwards converted into a double track railway. The borough of Carrick was incorporated in 1904 from territory in that part of the township of Baldwin through which the Brownsville road ran, and this road thereupon became a street of the borough.

In 1905 the borough of Carrick widened the Brownsville road to a width of sixty feet by adding five feet to each side, and, as part of this improvement and the paving of the street, the plaintiff paid for the paving of the tracks and three and a half feet on each side, at a cost of some thirty thousand dollars or more. When the borough was incorporated the railways company had a car barn in the borough, which was connected by switches with its tracks on the street.

Until a short time ago, the plaintiff company has been running single truck cars upon the road in question, and these have been stored in its car barn. The management lately reached the conclusion that it would be wise to use larger cars, with double trucks, and, therefore, purchased a number of such cars, they being more economical and

convenient in operation than the old cars, and they also afford better accommodations to the public. The car barn now in use is not adapted for storing cars of this size, and the building and plot of ground upon which it is erected does not afford sufficient space to store as many cars of the large type as the company wishes to store in that neighborhood. The plaintiff company, therefore, recently purchased additional ground at the southeast corner of Woodlawn avenue and Brownsville road for the purpose of building a new car barn thereon. Thereafter it applied to the council of the borough of Carrick for permission to lay switches from the tracks on the Brownsville road, across the pavement into this lot so purchased, in order that it might take its cars in and out of the barn which it proposed to build; but this permission was refused. Sometime thereafter application was made by the street railway company to the burgess of the borough, for a permit to lay such tracks, and the desired permit was issued by the burgess. Thereafter, on September 26, 1916, the Pittsburgh Railways Company attempted to lay switches from its tracks to the lot in question, but it was prevented from doing so by members of the council, and by the police of the borough.

It clearly appears from the record that, in 1890, the supervisors of Baldwin Township gave to the street railway company their written consent to construct or lay down on the road "a single or double track railway with the necessary sidings, turnouts and switches, and to maintain, operate and use such railway," during the term of the company's charter, and it further appears that, acting under the consent so given, the street railway company constructed its line of railway and operated it on the highway then in the township of Baldwin, for some fourteen years prior to the incorporation of the borough; and that its right to so build and operate was not questioned by the authorities of the borough for some twelve years thereafter, making in all a period of some

twenty-six years of unquestioned use of the highway by the street railway company. If, during the fourteen years that the territory in question remained in the township, the right of the street railway to occupy the highway remained unchallenged, it is, to say the least, doubtful whether the authorities of the borough, which was created after that time, had any standing which would properly enable them to raise the question. The fact that they made no effort to do so for twelve years afterward is strong evidence of acquiescence, upon the part of the borough authorities, in the claim of the street railway to rightful occupation of the highway. Laches may be imputed to the Commonwealth as well as to an individual: *Com. v. Bala & Bryn Mawr Turnpike Co.*, 153 Pa. 47, 53; *Bailey's Est.*, 241 Pa. 230, 232. And, if the Commonwealth may be charged with laches, clearly a municipality is not immune.

In the present case, when the street railway was projected the highway in question was in the possession, and under the control, of a turnpike company, and, according to the testimony of the attorney for the township supervisors, it was an open question whether, under the circumstances, the consent of the supervisors was necessary. But it was considered wiser to obtain their consent, if possible, and accordingly the supervisors met, and discussed the question, and signed a paper giving their consent to the construction of the railway upon the turnpike. They also acknowledged this paper in due form before a notary public. There was no township clerk, and no minute of the transaction was entered upon any township record. It is this feature which affords the only ground for objection to the validity of the grant of authority by the supervisors. The manner in which the consent of so elementary an organization as a township is given, where it is requisite, is not so important as that the fact of its being given should clearly appear. In such cases action should be taken by means of a formal resolution, duly recorded in the minutes of the

meeting. But where, as here, the consent of the township supervisors was evidenced by a written instrument duly signed and acknowledged by them, the failure of the supervisors to have a minute of the transaction entered upon their own records, cannot operate to invalidate the consent, which in fact was granted. Even in cases where consent has not been obtained in advance, as it should have been, there may be subsequent ratification. As was said by ENDLICH, J., in *Penna. Schuylkill Valley R. R. v. Philadelphia & Reading R. R.*, 160 Pa. 277, in an opinion approved by this court (p. 298): "Though the obtaining of the city's consent to occupy any of its streets be a condition precedent to the lawful exercise of the power to do so by a railroad company, it cannot be pretended that, where the power has been exercised without previous consent, the act cannot be subsequently ratified and legalized by the city. Nor is there any method prescribed by which alone consent can be given by the city, antecedently or subsequently. I agree with the master entirely that the facts of this case establish, in equity, a subsequent ratification by the city of plaintiff's entry upon its streets for the purpose of constructing the track here in question, by virtue of which, under the principle of *Com. v. Bala & Bryn Mawr Turnp. Co.*, 153 Pa. 47, and a multitude of other decisions, it has divested itself of the right to raise the objection of want of antecedent municipal authority."

In the case at bar, the court below passed over the question of the validity of the grant of authority by the supervisors, upon the ground that the subsequent action of the borough of Carrick in agreeing with the street railway company as to the share it would assume in paving the street, was ample evidence of the consent of the local authorities to the maintenance of the street railway as it then was. The trial judge was, however, of the opinion that the plaintiff company was not authorized to lay tracks outside of the cartway in the street, and that it had no implied right to do so. We cannot agree with

the limitation thus placed upon the rights of the street railway company. The grant of authority from the supervisors, which we regard as valid, is broad in its terms. It authorizes the construction of "a single or double track railway with the necessary sidings, turnouts and switches." Strictly speaking, a switch is a mechanical arrangement of movable parts of rails for transferring cars from one track to another. But, in common speech, the word "switch" is often used as a synonym for both siding and turnout. In *Philadelphia v. River Front R. R.*, 133 Pa. 134, Mr. Justice MITCHELL said (p. 139) that the three words, "not only in popular use, but in the dictionaries, are treated as to some extent interchangeable." In the present case it is apparent that a switch or turnout is necessary to connect the car barn with the lines of tracks in the street. In the opinion of Judge EVANS in the court below, granting the preliminary injunction, it was well said, "That the street railway when constructed and put into operation would require some place to store its cars when they were not in use, other than the tracks on the street traversed by the street railway company, is too self-evident a proposition to be discussed. It would not always be using all its cars, and it could not store those cars on tracks on the surface of the street that it traversed. It must have some place, either a building or a yard off the line of the street, in which to store its cars, and, to store its cars there, it must have a track connecting that point with its main line, and, with that necessary situation present to the ones who granted the franchise to the railway company to occupy the streets, they must have intended that the switches which they provided for should include a switch running to the car barn." In the same opinion the case of the *Cleveland & Pittsburgh Railroad Company v. Speer*, 56 Pa. 325, is cited, in which the question arose whether the railroad company, which had the right to occupy the street with its main track, had also the right to connect, by means of a switch, its main line with

its abutting property on which was erected its engine house and shop. Mr. Justice AGNEW there said (p. 335) : "The power of the company to run its road to Pittsburgh, and to locate and construct it on Preble street, being established, it carries with it the authority to make and maintain the switches which are the direct subject of this action. By the express words of this charter, the power is conferred of making as many sets of tracks as are deemed necessary. But if this were not expressed, it is clearly to be inferred from the general powers conferred and the essential purposes of the grant." And in *Beaver Boro. v. Beaver Valley Railroad Co.*, 217 Pa. 280, where the borough authorities had authorized the construction of the main tracks, but attempted to enjoin the construction of the siding, alleging that the company had no authority to construct it, our Brother, STEWART, after pointing out that the use of the switch and siding would be consistent with the continued use of the street as a public thoroughfare, said (p. 286) : "Under such circumstances the right of the company in the premises is not open to question. The right to build the switch and siding is included as a necessary incident in the right to build a railroad. So much we have repeatedly asserted."

It is suggested that as these rulings were made in steam railroad cases, they are not applicable to street railways. But, in so far as the principle under discussion is concerned, there is room for no such distinction in its application. In *Boro. of Pottsville v. People's Ry. Company*, 148 Pa. 175, the principle was directly applied to a street railway.

In dissolving the injunction in the present case, the trial judge cited and relied upon the decision in *Breen v. Railway Co.*, 220 Pa. 612. But the question there decided was essentially different. The railway company there proposed to lay a track on the sidewalk, between the curb line and the property line of complainants, the adjoining property owners; and it was held that this

would be an unauthorized invasion of their rights as abutting property owners. No such question arises in this case, as the complainant here is the abutting property owner, and is seeking to connect its tracks in the street with its own abutting property. It intends to construct its switches and sidings only on the cartway of the street and across its own sidewalk. There is no allegation that it proposes to touch the sidewalk in front of any premises other than its own.

The fact that, after the borough was incorporated, it widened the Brownsville road by adding five feet upon each side, has no bearing whatever upon the question under consideration. When the additional ground became part of the highway it was subject to the same uses and purposes as the ground which had been previously occupied as a highway. It added to the desirability of the street, and to the convenience of the public, which made use of it, and the plaintiff company recognized this fact by agreeing to increase the proportionate amount of paving which it should do. But its rights upon the highway, under its original grant of authority, were not limited to the width of the road as it then stood. It was entitled to share with the rest of the public in the advantages of a widened street. The borough authorities may without doubt exercise reasonable control over the manner in which switches are laid or sidings constructed. The original grant of authority provided that the work of construction, with reference to leaving the highway in good repair, should be done under the direction of the supervisors, who at that time constituted the local authorities in that respect. As was said in the opinion granting the preliminary injunction, the tracks should be laid so as to cause the least possible inconvenience to travel. And, if there be any irreconcilable controversy upon this subject, a court of equity will have jurisdiction to determine what is a reasonable occupancy of the street under the circumstances.

It is not necessary to consider the sufficiency of the

reasons of the borough council for refusing its consent to the laying of the switches, as those reasons are not involved in this appeal. The real question considered by the court below, and the only one presented here by the statement of the question involved, is the legal right of the railway company, under its grant of authority from the township, to lay switches connecting its main tracks in the street with its car barn upon its own abutting property, without the consent of the borough of Carrick, incorporated years afterwards, and within whose limits lie a part of the road covered by the township grant. Upon this question our conclusion is, that the plaintiff company clearly has the right and authority to lay such switches.

Of the assignments of error, the third to the fifth inclusive, the seventh to the twelfth inclusive, the fifteenth and sixteenth, and the twenty-first to the thirty-third inclusive, are sustained. The decree of the court below is reversed, and the bill is reinstated, and the record is remitted, with directions that an injunction be issued, restraining the borough of Carrick and the other defendants, and their agents and employees, from interfering with, preventing or obstructing the plaintiffs, in the construction, maintenance and operation of the necessary street railway switches or turnouts, connecting their double tracks on Brownsville road with their property at the southeast corner of Woodlawn avenue and Brownsville road in the borough of Carrick. The costs of this appeal, and in the court below, to be borne by the appellees.

**Fulginiti v. Diamond Coal & Coke Company,
Appellant.**

Practice, C. P.—New trial—Order granting new trial—Judicial discretion.

1. Whenever a trial court is convinced that a verdict has been obtained through improper influence exerted upon witnesses, it is

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not only the right, but it is the duty, of the court in the interest of public justice to order a retrial of the case.

2. A motion for a new trial is always an appeal to the discretion of the trial court, and the action of the lower court thereon is reviewable by the Supreme Court only as it can be made to appear that the court's action was a clear abuse of that discretion.

3. The action of a court in conditioning its grant of a motion for a new trial on the refusal by the defendant to pay a certain sum into court to the use of the plaintiff, in satisfaction of all his claims and demands, is not free from criticism.

Argued Oct. 3, 1917. Appeal, No. 68, Oct. T., 1917, by defendant, from order of C. P. Washington Co., Nov. T., 1916, No. 51, granting a new trial, in case of George Fulginiti v. Diamond Coal & Coke Company. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Trespass to recover damages for personal injuries.

Motion for a new trial. Before McILVAINE, J.

The opinion of the Supreme Court states the facts.

Verdict for defendant. The court subsequently granted a new trial. Defendant appealed.

Error assigned was the order of the court.

W. S. Dalzell, of Dalzell, Fisher & Hawkins, with him *H. A. Jones*, for appellant, cited: First Nat. Bank of Birmingham v. Fidelity Title & Trust Co., Admr., 251 Pa. 536; McBride v. Daniels, 92 Pa. 332; Bradwell v. Pittsburgh, Etc., Pass. Railway Co., 139 Pa. 404; Lehr v. Brodbeck, 192 Pa. 535; Stauffer v. Reading, 206 Pa. 479.

Rufus S. Marriner, with him *James A. Wiley*, for appellee.—The lower court did not abuse its discretion in granting a new trial: First Nat. Bank of Birmingham v. Fidelity Title & Trust Co., 251 Pa. 536; Wirsing v. Smith, 222 Pa. 8.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

The action of the trial court in conditioning its grant of a new trial on refusal by defendant to pay into court the sum of one thousand dollars to use of plaintiff, in satisfaction of all his claims and demands, the costs to be first deducted thereout, is not free from criticism; but that is now all passed and calls for no further reference, since the defendant declined to accept the terms, and consequently no injury has resulted to it in consequence of the action taken. The trial court expressly and distinctly, in the opinion filed refusing a bill of exceptions to the preliminary decree complained of, bases its action in granting a new trial on the ground that one of the plaintiff's witnesses had been "improperly influenced to testify as he did at the trial," and states further that the interlocutory decree was intended merely as a condition on which the defendant could avoid the new trial which the court had determined the plaintiff was entitled to for the reason above stated, thus making it plainly evident that it was upon the one consideration above mentioned that the new trial was ordered, and that alone. We see no error in this. A motion for a new trial is always an appeal to the discretion of the trial court, and the action thereon is reviewable by us only as it can be made to appear that the court's action was a clear abuse of that discretion. Here the court asserts as a fact that a witness for the plaintiff had been improperly influenced to testify as he did. The testimony in the case is not before us, and we have no way of determining to what extent the testimony of the witness was a departure from his previous declarations; nor is it material that we should be further informed. It is enough to know that to the mind of the court the witness had been improperly influenced. We have no hesitancy in saying that whenever a trial court is convinced that a verdict has been obtained through improper influence exerted upon witnesses, it is not only the right, but it is the duty of the court, in the interest of public justice, to order a

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retrial of the case. And that was the case here, as the record before us shows.

The order granting a new trial is affirmed and the appeal dismissed.

Hunter, Receiver, Appellant, v. Henning.

Set-off—Suit against defendant individually—Set-off of claim due defendant in representative capacity—Refusal.

1. A cardinal rule in the interpretation of statutes of set-off, requires that there be mutuality of demand, both as regards the quality of the right and identity of the party; by mutuality in quality of right is to be understood mutuality of right with respect to the legal remedy provided for the enforcement of the several demands.

2. In an action by the receiver of a bank brought against the maker of promissory notes held by the bank, the defendant cannot set-off against the plaintiff's demand, bank deposits made by him in a fiduciary capacity, prior to the insolvency of the bank, since to permit such a set-off would allow the defendant to pay his own debts with money belonging to others.

Argued Oct. 8, 1917. Appeal, No. 11, Oct. T., 1917, by plaintiff, from judgment of Superior Court, April T., 1916, No. 129, reversing judgment of C. P. Allegheny Co., Oct. T., 1914, No. 1410, for plaintiff, for want of a sufficient affidavit of defense, in case of David Hunter, Jr., Receiver of the Land Trust Company, v. J. F. Henning. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Reversed.

Appeal from Superior Court.

The opinion of the Supreme Court states the facts.

The Court of Common Pleas entered judgment in favor of plaintiff. The Superior Court reversed the judgment of the Court of Common Pleas. Plaintiff appealed.

Error assigned was the judgment of the Superior Court.

Alexander J. Barron, of McKee, Mitchell & Alter, for appellant.—Demands which may be set off under the statutes of set-off must be due between the same parties and in the same right: *Darrochs' Executors v. The Administrator of Hay*, 2 Yeates 208; *Potter v. Burd*, 4 Watts 15; *Stuart v. Commonwealth*, 8 Watts 74; *Murray v. Williamson*, 3 Binney 135; *Wolf v. Beales*, 6 S. & R. 241; *Henderson v. Lewis*, 9 S. & R. 379; *Stuart v. The Commonwealth*, 8 Watts 74.

If the decision of the Superior Court is the law, the distinction between trust funds and personal funds becomes obliterated, so far as the doctrine of set-off is concerned.

A set-off will not be permitted where to allow the same would be inequitable and prejudice the rights of third persons not parties to the suit: *Wolfersberger v. Bucher*, 10 S. & R. 10; *Executors of Henry Darroch v. Administrator of Michael Hay*, 2 Yeates, 208; *Wilmarth v. Mountford*, 8 S. & R. 124; *Potter v. Burd*, 4 Watts 15; *Arnold v. The Macungie Savings Bank*, 71 Pa. 287; *Burger v. Burger*, 135 Pa. 499; *First Natl. Bank of Lock Haven v. Mason*, 95 Pa. 113; *Citizens N. Bank v. Alexander*, 120 Pa. 476; *Patterson v. Marine N. Bank*, 130 Pa. 419-431.

Samuel L. Dille, for appellee.—A depositor of an insolvent bank has the right to set off his deposit against a note due by him: *Jordan v. Sharlock*, 84 Pa. 366; *Skiles v. Houston*, 110 Pa. 254; *Jack v. Klepser*, 196 Pa. 187.

Set-off is not confined to the statute. It is an equitable defense and the courts in the exercise of their chancery powers will allow it whenever there is a special equity to be subserved, and no superior equity of third persons to be injured: *Frantz v. Brown*, 1 P. & W. 257; *Hibert v. Lang*, 165 Pa. 439.

As a legal defense it is held that the set-off must be between the same persons and in the same right. The rights are the same in quality or mutuality when the

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party claiming to defalk has a right of action to recover and a right to receive the fund when recovered because the legal title is in him; or because he has an equitable right in the property itself: *Hugg v. Brown*, 6 Wharton 468.

An administrator or executor deals with the goods of his intestate personally, hence he may set off a claim due him as administrator against his personal debt.

A trustee having the right of action because the legal title is in him, and the legal right to the property when recovered, can use the same as a set-off in an action against him for a personal debt: *Wolf v. Beales*, 6 S. & R. 241.

Courts in the exercise of their equity powers favor set-off to prevent circuity of action; they have not limited their jurisdiction to the statute but have frequently gone beyond it. A set-off will be allowed if there is a special equity to be subserved and no superior equity of third persons to be injured: *Montz v. Morris*, 89 Pa. 392; *Hibert v. Lang*, 165 Pa. 439.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

This is an appeal from the judgment of the Superior Court, reversing a judgment of the Common Pleas Court of Allegheny County. The case will be found reported in 64th Superior Court Reports, page 366. The original action was brought by a receiver of an insolvent bank to recover from the defendant, here the appellee, the amount due on a note for \$950, of which he was maker. The liability of the defendant on the note was not in dispute, nor was the amount due, namely, \$400. The only question in the case arose with the attempt on the part of the defendant to set off against the plaintiff's demand two several deposits that had been made by the defendant in the bank prior to its declared insolvency, one to the credit of himself as "executor of E. O. Anderson" in \$150.64, and one to the credit of himself as "trustee of J. Dorothy Henning, a minor," in \$205.41. The trial court

refused the set-off and judgment was accordingly rendered in favor of the receiver for the full amount of the claim sued on. Appeal was taken from the judgment so entered to the Superior Court, with the result that the judgment of the lower court was there reversed, the appellate court holding that the set-off should have been allowed. This states the whole case on its facts, and these give rise to a single question of law.

Were these several demands, that is to say, the note on which suit was brought and the several deposits in bank offered as set-offs, due in the same right? In other words, the right of action for the recovery of the note being conceded in the plaintiff, did the defendant have a corresponding right of action to recover from the bank the several deposits above specified? If he had such right, the cases cited in support of the conclusion on which the judgment of the Superior Court is rested are not only apposite, but fully vindicate the judgment; otherwise, they come short of the purpose for which they are cited. It was no part of the judicial purpose in any of these cases to abate anything from or qualify in any degree what GIBSON, C. J., in *Stuart v. The Com.*, 8 Watts 74, calls "a cardinal rule in the interpretation of statutes of set-off," and which he says "requires that there be mutuality of demand both as regards the quality of the right and identity of parties." By mutuality in quality of right is to be understood mutuality of right with respect to the legal remedy provided for the enforcement of the several demands. The plaintiff here sues the defendant in the latter's own right, on his individual indebtedness. Except as it is available for the defendant to sue the bank in his own right to recover the bank deposits, there is no mutuality in quality of right. This becomes apparent when the purpose of the statute is considered. This, as repeatedly declared, is the avoidance of circuity of action. "The foundation of set-off," says MITCHELL, J., in *Hibert v. Lang*, 165 Pa. 439, "is the prevention of circuity of action. It is therefore the

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general rule that cross-demands must be held in the same persons and in the same rights so that actions may be maintained thereon each against the other." To be mutual the cross-demand here set up must be shown to belong individually to the defendant with corresponding right to sue for the same in his individual name, otherwise the debts cannot be said to be due in the same rights. The case of *Wolfersberger v. Bucher*, 10 S. & R. 10, relied upon as sustaining 'the right of set-off here claimed is not in any way inconsistent with what we have said, but supporting rather. There the action was brought on a note given by the defendant for the price of goods purchased at a sale of an intestate's effects. The plaintiff in the action was the administrator, but the action was brought in his individual name, which the court, for reasons unimportant here, held to be proper, and that he had a right of action within himself. The debt offered to be set off was due by the intestate in his lifetime. It was disallowed in the court below, and on appeal the disallowance was affirmed by this court in the following explicit language: "This, then, is an action brought by a man in his own right in which there was an offer to set off a demand due by him as administrator; and it is well settled that such set-off cannot be allowed. In this case the plaintiff would be at liberty to join with the present cause of action any demand proper in other respects, although without the slightest cast (sic) of being due to him in a representative character; which shows he was the owner of the debt and not merely entitled to the remedy; and the establishing of that point, independent of any other ground, is decisive of the question."

In the present case, the action was brought not by the bank, but by the receiver in his representative capacity. The offer of set-off was a demand due from the bank, if in any event to the defendant, due him only in his representative character as executor and as trustee. In the case cited, the decision rested distinctly on the

ground of want of mutuality—that the debts due were not due in the same right. In the case in hand, the demands offered as set-off are not due the defendant, J. F. Henning. If it be assumed that the legal title to the funds that are the basis of these demands was once in him as administrator and trustee, under the doctrine of *Wolfersberger v. Bucher*, *supra*, he had divested himself of that legal title when he segregated them from his own funds in the manner he did; depositing neither in the bank as his own, but designating each in a way showing unmistakably to whom it belonged. In doing so he put it beyond his legal right to exercise any control whatever over either deposit, unless in his representative capacity. His individual check upon either deposit the bank could have safely dishonored; it could have honored such check only at its peril, for in his individual capacity it owed him nothing. Each deposit was a special appropriation by the defendant of trust funds in his hands; he had no property right in either; neither could have been attached by his individual creditors, and in case of failure of the bank he would have been exempt from loss. *German National Bank v. Foreman*, 138 Pa. 474. These deposits, made in the way they were, can only be regarded as an equitable assignment for the uses designated. Nor does the case of *Wolf v. Beales*, 6 S. & R. 241, also cited and relied on, conflict. There the defendant was sued to recover a debt he individually owed; the cross-demand he set up was plaintiff's indebtedness on a bond given to one Pearson, and by Pearson transferred to the defendant. From the condition in the bond it appears that the money due was payable to the obligee named, in trust for another. On this bond plaintiff could have sued only as trustee, not having the right of action thereon in himself. It was so held and the set-off was refused solely on this ground, the court by GIBSON, J., saying: "It may be stated as a general rule, that the person having the right of action may set off a debt due to him as trustee against a debt due by him in his own right, ...

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but it is extremely clear that the right to set-off must depend on either the right of action or the right of property, and here the defendant had neither. The bond was not assignable under the act of assembly, being payable only to the obligee himself, who was, therefore, not authorized to transfer the right to sue on it at law, and the property in the money it was given to secure being another's, he could not transfer an equitable right of action, which can pass only as an incident of the right of property. On what ground, then, could the defendant below have sustained a suit? Only, if at all, as trustee having a remedy—as therefore the defendant could not have sustained the suit on the bond, the court was right in refusing to permit him to set it off.” If we are correct in saying that in the present case the plaintiff could not have maintained an action against the bank for the recovery of these deposits, except in representative capacity, then, instead of supporting the contention of the appellee, the case goes directly to the contrary. The case of *Solliday v. Bissey*, 12 Pa. 347, is readily distinguished from the present one. There it was a fact, expressly so stated by the court, that the debt set off was a debt owing the executors on their own contract and in their own right, the court adding: “In all cases of promises, express or implied, made to or by an administrator after the death of the intestate, and the same holds as to executors, the action lies by and against the administrator personally.” It was upon this legal right that the set-off was allowed. *Solliday v. Bissey*, 12 Pa. 347, a case cited in the opinion of the court in *Jack v. Klepser*, 196 Pa. 187, calls for no present consideration, for however applicable there, it is without relation to the question here being considered.

The case turns upon the question of mutuality in quality of right with respect to these counterclaims. The action was against the defendant in the latter's own right, that is to say, for his individual debt; what he claimed to set off was a demand against his creditor in

which he had no property right himself, not even the right of possession, and for the recovery of which he could sue only, if at all, in a representative character. The manifest effect of allowing such a set-off would be to enable a debtor to pay a debt of his own with money belonging to other people. This cannot receive judicial sanction.

Our effort has been to show the absence of the mutual-ity the law requires in such cases. If we have succeeded, and we think the authorities cited support this view, then it must follow that the lower court was correct in refusing to allow the set-off urged.

The judgment of the Superior Court is reversed.

Herron, for Use of Murray, Receiver, v. Stevenson et al., Appellants.

Mortgages—Death of mortgagor—Decedent's estate—Scire facias against heirs—Failure to join administrator—Affidavits of defense—Insufficiency.

1. While lands are assets for the payment of debts, they are not assets in the hands of an administrator and without an order of the Orphans' Court he has nothing to do with them. In case of intestacy they descend to the heirs, and if needed for the payment of debts they must be converted in the manner provided by the statutes.

2. In an action of scire facias sur mortgage, where it appeared that the mortgagor had died intestate, the heirs were properly made parties defendant and it was not necessary that the administrator of the decedent be joined, in the absence of anything to show that the decedent's real estate was needed for the payments of debts, and the court properly held insufficient an affidavit of defense which merely set up that the action could not be maintained because the administrator has not been joined as party defendant.

3. In such case where the note was under seal there is no merit in the contention that the mortgagor was not a party to the note and it was therefore without consideration, where no failure or illegality of consideration is alleged.

4. The doctrine that interest as against the surety does not begin with the default by the principal, but from the time when demand was made, applies only to cases arising on official bonds.

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Argued Oct. 8, 1917. Appeal, No. 24, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., Oct. T., 1916, No. 1350, for want of a sufficient affidavit of defense, in case of Andrew W. Herron, for use of C. C. Murray, Receiver of the Fort Pitt National Bank of Pittsburgh, now for use of Henry Terheyden, v. Joseph S. Stevenson, Robert A. Stevenson, William T. Stevenson, and Mary I. Stevenson Waugh, Sole Heirs of Mary I. Stevenson, Deceased. Before MESTREZAT, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Scire facias sur mortgage.

Rule for judgment for want of a sufficient affidavit of defense. Before SHAFER, P. J.

The opinion of the Supreme Court states the facts.

The court made absolute plaintiffs' rule for judgment for want of a sufficient affidavit of defense. Defendants appealed.

Error assigned was in making absolute plaintiffs' rule for judgment for want of a sufficient affidavit of defense.

Paul A. Stuart, for appellants.—This action could not be maintained because no administrator had been appointed for the intestate mortgagor: *Brown v. Wagner*, 1 Monaghan 102.

Charles A. Woods, for appellee.—The heirs were properly made parties defendant.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

The appeal is from a judgment entered for want of a sufficient affidavit of defense in an action of scire facias sur mortgage. The mortgage was given March 14, 1901, by Mary J. Stevenson, to secure a note for \$3,100.00 on which her three sons were endorsers, and for all renewals of the same. The indebtedness on the note had been reduced from time to time until at the time of the last re-

newal, November 18, 1907, it amounted to but \$1,300.00, and for this amount a new note was then given, payable at four months. This note has never been paid and the present demand is for the amount due thereon, debt and interest. Mary J. Stevenson, the mortgagor, died December 23, 1907. No legal steps have been taken for the settlement of her estate, and she is therefore without legal representative. The *scire facias* was directed against the defendants named as her heirs at law. It is urged that the action cannot be sustained because of want of proper parties defendant. The affidavit of defense alleges nothing with respect to the condition of the mortgagor's estate that would require the intervention of a personal representative; it is not averred that the mortgaged premises are required for the payment of debts; except as it is so required the personal representative would have nothing to do with it; it descends directly to the heirs at law. In *Morrison's Est.*, 196 Pa. 80, it is said: "While in this State lands are assets for the payment of debts, they are not assets in the hands of an administrator, and without an order of the Orphans' Court he has nothing to do with them. In case of intestacy they descend to the heirs, and if needed for the payment of debts there is a mode pointed out by the act of assembly which the administrator is bound to pursue, 'or the real fund is not absolutely, but sub modo, assets in his hands': *McCoy v. Scott*, 2 Rawle 222; *Bakes v. Reese*, 150 Pa. 44. 'Although the administrator may assume to act in his representative capacity in the management of the real estate and the collection of the income thereof, he is merely the agent of the heir': *Appeals of Fross and Loomis*, 105 Pa. 258; *Walker's App.*, 116 Pa. 419. This rule has been strictly adhered to." "The undoubted weight of authority, when the question is not affected by statute, is to the effect that in suits of the character under consideration the personal representative is not a necessary party in that if the heir desires the benefit of having the personal estate applied in exonera-

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tion of the real, he must enforce the right by filing a bill for such relief": Cyc. 18, page 549. It follows that the sci. fa. in this case was properly directed against the heirs of the mortgagor.

Of quite as little weight is the objection urged of want of consideration. It makes not a particle of difference if the mortgagor was not a party to the note secured by the mortgage. None the less does the mortgage, being under seal, import a consideration; it expressly recites that it is given as collateral security. What difference can it make who or what party was to be advantaged thereby? Neither failure nor illegality of consideration is alleged, and nothing short of these could be inquired into with respect to the consideration.

A point is raised that because no demand was made of payment of interest between the default of the principal debtor and the bringing of the action against the defendants, standing as they do in the relation of surety to the principal debtor, interest is not now demandable, on the principle that interest as against a surety begins not with the default by the principal, but from the time when demand was made. It is only necessary to observe in reply that the cases cited in support are cases which arose on official bonds: *Foltz v. Tradesmen's Trust & Savings Fund Co.*, 201 Pa. 583, and *Pennsylvania Co. v. Swain*, 189 Pa. 626, and the doctrine does not extend beyond these. The plaintiff's statement showed a sufficient legal cause of action; nothing is averred in the affidavit of defense that, if proved, could defeat it.

The judgment is affirmed.

**Byrne v. The Pittsburgh Brewing Company et al.,
Appellants.**

Negligence—Master and servant—Calling another to assist servant—Injuries to the person called—Judgment for defendant n. o. v.

1. While the relation of master and servant cannot be imposed

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upon a person without his consent, express or implied, a servant may engage an assistant, in case of an emergency, when he is unable to perform the work alone, and such assistant becomes, for the time being a servant of the master whose employee engaged him.

2. Where in such an emergency such temporary employee is injured in consequence of defects in the premises upon which he is requested to work he may hold the master of the servant who called him to assist liable for such injury but in such case he must establish that an emergency existed sufficiently great to warrant the calling upon him for aid.

3. Where the driver of a motor truck, owned and operated by a brewing company, lost his way and requested a friend to ride with him to point out the direction in which he should go, and the friend of such driver complied with such request and rode for a distance in the motor truck and was injured in consequence of defects therein, he could not hold the owner of the motor truck liable for such injuries in the absence of anything to show that his presence on the truck was necessary to guide the driver to the proper road, particularly where it further appeared that the way was easy to find and that a description thereof would have been sufficient.

Argued Oct. 9, 1917. Appeal, No. 48, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., April T., 1915, No. 1485, on verdict for plaintiff, in case of Christopher C. Byrne v. The Pittsburgh Brewing Company, a Corporation Operating the Iron City Brewing Company and The Pittsburgh Brewing Company. Before MESTREZAT, STEWART, MOSCHISKEE, FRAZER and WALLING, JJ. Reversed.

Trespass to recover damages for personal injuries. Before SWEARINGEN, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff for \$3,983 and judgment thereon. Defendants appealed.

Errors assigned, among others, were in refusing to direct a verdict for defendant and in refusing to enter judgment for defendant n. o. v.

BYRNE v. PITTSBURGH BRWG. CO. et al., Appel. 359
1918.] Arguments—Opinion of the Court.

Arthur E. Young, with him *Grant Curry*, for appellant.—Plaintiff was a volunteer and may not recover even though his injuries were caused by a defective condition of the brakes: *Flower v. P. R. R. Co.*, 69 Pa. 210; *Wischam v. Rickards*, 136 Pa. 109; *Towanda Coal Co. v. Heeman*, 86 Pa. 418; *Missouri, K. & T. Ry. Co. of Texas v. Moore*, 169 S. W. 916; *W. B. Conkey Co. v. Bueherer*, 84 Ill. App. 633; *Langan v. Tyler*, 114 Fed. 716.

Thomas L. Morris, with him *L. K. & S. G. Porter*, for appellee.—Plaintiff was not a volunteer: *Wischam v. Rickards*, 136 Pa. 109; *Abraham v. Reynolds*, 5 H. & N. Exch. 142; *Wright v. The London & North Western Ry. Co.*, L. R., 1 Q. B. Div. 252; *McConnell v. P. R. R. Co.*, 223 Pa. 442.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

The accident out of which this action arose occurred in this way. The defendant company, in the conduct of its business, maintains and operates several gasoline motor trucks which it employs in the delivery of its brewery products to its customers in the surrounding country. One of these customers was the proprietor of what is known as the Byrne Hotel, located on the Butler plank road about ten miles from the City of Pittsburgh. To fill an order for beer and ice it had received from this hotel, it loaded one of these trucks with the goods required, placed it in charge of a driver who had been in its employ for about seven or eight years and had frequently driven over the route, with directions to make the delivery. This employee drove out the Butler pike, a road running parallel with the plank road and with which he was familiar, until he reached a point nearly opposite the Byrne hotel on the plank road. At this point there is a cross road about a half mile in length leading directly across to the plank road, connecting at or near the hotel, and which he was accustomed to take

in making his deliveries. He found this short piece of road impassable in consequence of repairs that were being made to it. Leaving his motor truck with its load in charge of a man who, for unexplained reason, had been riding with him, he walked over to the hotel and there met this plaintiff, a son of the proprietor, whom he well knew, told him of the fact that he had the goods for delivery on his truck, where the truck was, but that the condition of the road over from the pike prevented his reaching the hotel by that way, and asked to be informed how to get across by another way. The plaintiff told him that by continuing on the pike for about a mile he would come to another cross-road leading directly from the pike across to the plank road to a point about a mile beyond the hotel. The driver asked him to walk back with him to the motor truck and ride with him from that point over the route he had suggested, as he was afraid of getting lost if he attempted it alone. The plaintiff declined, giving as his reason that he was needed about the hotel, it being near the dinner hour, but on being again requested, he consented. Together they walked to the motor truck, the plaintiff there taking a seat with the driver on the truck, as did also the man whom the driver had left in charge of the truck and its load and who was an entire stranger to the plaintiff. Together the three proceeded on their way up the pike until they reached the crossroad, where they turned to the right into the crossroad. They had nearly reached the end of this road, were very close to the plank road, when towards the foot of a declivity, the truck having then got beyond the control of the driver, it ran into a gulley, with the result that the truck was thrown over an embankment and the plaintiff met with the injury for which he brought his action. He based his right to recover on the ground that the proximate cause of the accident was defective brakes on the motor truck, because of which the driver was unable to control the speed of the truck on the declivity. The verdict of the jury awarding the plaintiff damages in

\$3,983.00 implies a finding of negligence on the part of the defendant in the respect indicated. At the conclusion of the testimony defendant's counsel asked for binding instructions in favor of the defendant. This was refused. A motion for judgment non obstante followed, which was also refused, and judgment was accordingly entered on the verdict. Of the errors assigned on the appeal, one only need be considered.

If the plaintiff is entitled to recover at all against this defendant, it must be because he stood in the relation of servant or employee of the defendant and was in the course of his employment when he sustained his injury. It may be technically inexact to speak of plaintiff as a volunteer, since it is not disputed that he accompanied the driver on the truck at the latter's request; but that is an immaterial matter, since it is clear that he had no other right to be upon the truck except such as he acquired from the driver. Except as the driver could confer such right, the plaintiff stood in no relation with the defendant whatever and the latter owed him no duty of protection. It is a rule universally recognized that the relation of master and servant cannot be imposed on a person without his consent, express or implied. It is upon the exception to this general rule, which is quite as well settled as the general rule itself, that the plaintiff relies to establish the relation of master and servant in this case. The exception is that a servant may engage an assistant in the case of an emergency where he is unable to perform the work alone. Both rule and exception have been repeatedly recognized and enforced in our own cases, notably in the case of *Flower v. Penna. R. R. Co.*, 69 Pa. 210, and of *Wischam v. Rickards*, 136 Pa. 109, and neither calls for discussion further than to ascertain whether, from the evidence adduced on behalf of the plaintiff, it can be rightfully determined, (1), that the conditions existing when the driver requested the plaintiff to accompany him were such that the driver would be in danger of becoming lost and long delayed in reaching

the place of delivery if he attempted the road he was advised to take, unaccompanied by someone familiar with it, and, (2), whether if the evidence warrants an affirmative answer, the conditions testified to constitute such an emergency as would warrant the driver in employing the plaintiff in such way as to make him a servant of the defendant, entitled to a servant's rights of protection. These were the questions in the case, and the burden of establishing both affirmatively was upon the plaintiff. They may be considered together. No one knew better than the plaintiff, because of his admitted knowledge of and familiarity with the road which he had advised the plaintiff to adopt, what if any risk or danger the driver would run of missing the road, or losing himself if he chose it. All that was required was that he should continue on the road which he had traveled, the Butler pike, for a distance of about one mile, when he would reach a short cross road about a half or three-quarters of a mile in length and the only cross road he would encounter, one that led over to the plank road on which was located the hotel at which the delivery was to be made, this cross road being, as plaintiff himself testified, in excellent condition and in no way confusing, since no other roads led from it. When the plaintiff was asked whether, on the road he described, it would be possible for the driver to get lost, his only reply was that he "did not suppose anybody would get lost as long as they had a tongue." Nowhere in his testimony does he pretend that in acceding to the request of the driver to accompany him he did so in order to save him from mistaking the road; but, on the contrary, he repeatedly asserted that his only purpose in accompanying him was to save time. How this was to result he nowhere says. Nor does a single witness testify that the situation in which the driver found himself called for any guidance whatever. On the case as presented by the plaintiff and his witnesses, it is simply incredible that, in the conditions there present, traveling from one thoroughfare over an established side or cross

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road for a half or three-quarters of a mile to another main thoroughfare which he wished to reach, a full grown man and an experienced driver, in such a country as that is, would be in danger of losing himself. It is none the less incredible that under the conditions shown to have existed such an one could be left in uncertainty as to the particular road he was advised to take. This is the turning point in the case. Did there exist a necessity for the plaintiff's assistance? Did an emergency actually exist? The law in such cases is thus stated in *Fiesel v. The New York Edison Co.*, 123 App. Div. 676, 108 N. Y. Supp. 130: "An emergency employee called on by another employee to assist him, for however short a time, becomes a fellow servant and subject to the rules of law applicable to the injury of a servant by his fellow, but he must be so called as of necessity in order to make him an employee, for a servant has no authority to call on another to help him in his master's business as of necessity, unless the necessity exists. If he can do the work himself, there is no occasion of necessity to imply power in him to employ assistance." This is simply the common law rule. At the furthest, the assistance rendered by the plaintiff in this case may be construed as serving the convenience or pleasure of the driver; but this comes far short of a necessity calling for assistance. The emergency, as used in the rule, implies necessity for assistance. Manifestly here was no emergency. There is absolutely nothing in the evidence which brings the defendant into any relation with the plaintiff out of which a duty of protection could possibly arise. The case called for judgment non obstante, and it was error to refuse it.

The judgment entered is accordingly reversed, and judgment is here entered for the defendant.

Aland, Appellant, v. Cluett, Peabody & Company.

Contracts — Bailment — Written contracts — Purchase-price — Agreement as to purchase-price — Insufficiency — Plaintiff's statement — Quantum meruit.

A manufacturer of shirts sent a circular to various persons, engaged in the business of trimming windows, offering prizes for designs, and requesting photographs thereof. The owner of certain designs mailed photographs of them to plaintiff, with a formula for making the substance out of which the designs were to be constructed and a notice on the backs of the photographs that the designs were valuable, and that the photographs were to be returned. On the back of one of the photographs was an endorsement that the value of the original design was \$2,000, and on the other photograph that it was worth \$3,000, and that the formula was worth \$5,000. The owner of the photographs wrote plaintiff that if the conditions on the backs of the photographs were acceptable they could use them in their exhibits, otherwise they should return them. The manufacturer replied merely stating that the photographs and letter had been received. The photographs were used in the exhibition, were not returned to the owner and were subsequently lost. In an action on an express contract to recover the amount endorsed on the reverse side of the photographs as their value and that of the formula, there was no evidence that defendant's attention was ever drawn to the endorsement or that he ever agreed to pay the amounts therein stipulated. *Held*, (1) the warning contained in plaintiff's letter to defendant was sufficient to indicate that the photographs and formula were valuable and merely bailed to defendant, and defendants are liable for their reasonable worth, if properly declared for, (2) the writing on the back of the photographs and the acceptance and use thereof did not constitute a contract to pay the amount expressed in such writing, and (3) a compulsory nonsuit was properly entered.

Argued Oct. 10, 1917. Appeal, No. 96, Oct. T., 1917, by plaintiff, from order of C. P. Allegheny Co., Sept. T., 1910, No. 782, refusing to take off nonsuit, in case of G. W. Aland v. Cluett, Peabody & Company, a Corporation of the State of New York, Registered and Doing Business Under the Laws of Pennsylvania. Before MESTREZAT, POTTER, STEWART, MOSCHISKE and FRAZER, JJ. Affirmed.

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Opinion of Court below.

Assumpsit on a contract of sale.

SHAFFER, P. J., filed the following opinion, *sur* plaintiff's motion to take off nonsuit:

The action is assumpsit upon what is claimed to be a written contract formed by letters between the plaintiff and defendant.

The defendant is a manufacturer of shirts, and in the year 1909 sent a circular to various persons throughout the country who were engaged in the business of trimming windows and making window displays, offering prizes for designs, and directing that photographs of the designs should be sent to them.

The plaintiff, in response to this circular, sent to the defendant two photographs of two separate designs, and a formula for making the substance out of which the designs were to be constructed.

He fastened to each of the photographs a notice, or rather, two notices signed by himself. The substance of each was that these designs were valuable, and that the defendant should take great care to return them to him, as the negatives of the photographs had been destroyed, and it would be difficult to replace them. He also wrote on the back of one photograph that the "value of this original design is two thousand dollars"; on the other photograph the statement that it was worth three thousand dollars, and on the formula that it was worth five thousand dollars. And he sent a letter also, in which he said to the defendants that, if the conditions on the back of the photographs were acceptable, they should go on and use the photographs in their exhibit; that otherwise they should return to him.

He received a reply which merely stated that the photographs and letter had been received. The photographs were then used in the exhibition carried on by the defendant. The defendant claims to have lost the photographs and was unable to return them.

When the case was first brought no mention was made in the pleadings of the prices alleged to be affixed to each

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of these photographs and the formula, but some five years afterwards an amended statement of claim was filed, in which these inscriptions on the back of each of the photographs and the formula were alleged, and the case was put upon the contract alleged to be made by these writings to pay these several sums if the photographs and formula were not returned.

The plaintiff expressly stated on the trial that he was not claiming on a *quantum meruit* or a *quantum valebat*, but on a contract made by the writing for these sums of money.

While the circular says nothing whatever about the return of the photographs and in the absence of any further agreement or statement as to their return, the sending of the photographs in reply to the circular would not seem to bind the defendant to return them, yet the warning contained in the letter referred to the notice on the back of the photographs that they were valuable, and that he desired to have them returned, was sufficient to indicate that the photographs and formula were merely bailed to the defendant; that they were to return them, and this would, in our opinion, be sufficient to make out a case against the defendants, for whatever the photographs were reasonably worth, if that had been declared for and evidence given upon it. But we are clearly of the opinion that the mere writing of an alleged schedule upon the back of the photographs and the acceptance and use of the photographs containing such writing, did not amount to a contract to pay those sums in case the photographs or formula were not returned.

As the case stands the plaintiff is entitled to recover either ten thousand dollars or nothing. In the absence of any evidence that the defendant's attention was ever called to the alleged inscriptions on the back of the photographs and formula stating their value, we are unable to see how the writings could be construed as an agreement to pay those amounts.

ALAND, Appellant, v. CLUETT, PEABODY & CO. 367
1918.] Assignment of Error—Opinion of the Court.

The court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiff appealed.

Error assigned was in refusing to take off the nonsuit.

Harry R. Bunton, with him *Thos. L. Kane*, for appellant.

A. W. Forsyth and *George J. Kambach*, for appellee, were not heard.

PER CURIAM, January 7, 1918:

The judgment is affirmed on the opinion of the learned president judge of the court below refusing the motion to take off the nonsuit.

Smith v. Young, Appellant.

Statutes—Amendatory acts—Construction—Intention.

1. A statute, amendatory of another, declaring that the former shall read in a particular way, must, in general, be held to repeal all provisions not retained in the altered form. All matters not incorporated into the amendment, the latter must be held to have repealed.

Real property—Deeds—Recording of deeds—Priority—Acts of March 18, 1775, 1 Smith's Laws 442, Sec. 1; May 19, 1893, P. L. 108—Construction.

2. The Act of May 19, 1893, P. L. 108, amending the Act of March 18, 1775, 1 Smith's Laws 422, carefully and deliberately changed the law relating to the recording of deeds and conveyances, and now all deeds and conveyances made and executed within this Commonwealth are required to be recorded within ninety days after execution, and every deed or conveyance not recorded within that time is fraudulent and void as to subsequent purchasers or mortgagees.

3. The owners of certain real estate delivered an agreement for the sale thereof on December 11, 1916. The agreement was re-

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corded on March 26, 1917, one hundred and five days after its delivery. On February 26, 1917, the owner of the said land delivered a deed therefor to another party, for a valuable consideration, in pursuance of an agreement made by them on January 15, 1917. Said deed was recorded on April 23, 1917, 56 days after the date of its delivery. On a case stated, brought by the grantee in said deed to determine the validity thereof, the lower court held that the failure of the first purchaser to place his agreement on record within ninety days after its execution, as required by the Act of 1893, rendered his title void as against the plaintiff, and entered judgment for the plaintiff. *Held*, no error.

Davey v. Ruffell, 162 Pa. 443, criticised as to dicta in the opinion.

Argued Oct. 18, 1917. Appeal, No. 181, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1917, No. 1008, for plaintiff, on case stated, in case of Teany Smith v. J. George Young. Before BROWN, C. J., POTTER, MOSCHISKEB, FRAZER and WALLING, JJ. Affirmed.

Case stated to determine plaintiff's interest in certain real estate. Before EVANS, J.

The opinion of the Supreme Court states the facts.

The court entered judgment for plaintiff on the case stated. Defendant appealed.

Error assigned was the judgment of the court.

Wm. M. Hall, for appellant, cited: Davey v. Ruffell, 162 Pa. 443; Fries v. Null, 154 Pa. 573.

George E. Alter, of McKee, Mitchell & Alter, for appellee.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

This was a case stated to determine the title to certain real estate. On December 7, 1916, the owner of the property, McCullough, his wife joining, entered into articles of agreement for the sale of the property to one Fogarty, and on December 11, 1916, Fogarty executed

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and delivered an agreement for the sale of the premises to J. George Young, the defendant. On March 26, 1917, these agreements were recorded in the recorder's office of Allegheny County, where the property in question was situated. On January 15, 1917, McCullough and his wife entered into an agreement with Charles F. Smith, acting for his wife, the plaintiff, for the sale of the same property, and on February 26, 1917, McCullough and wife, in pursuance of the agreement, executed a deed to the plaintiff. This deed was recorded on April 23, 1917, fifty-six days after the date of its delivery, while the defendant, Young, did not place the evidence of his title upon the record until one hundred and five days from the date of its delivery. The court below held that by his failure to record his agreement within ninety days of its execution, as required by the provisions of the Act of May 19, 1893, defendant lost his title as against the plaintiff, a subsequent purchaser.

By the Act of March 18, 1775, 1 Sm. L. 422, Sec. 1, it was provided that all deeds and conveyances executed within the province of Pennsylvania for lands, tenements and hereditaments in the province should "be recorded in the office for recording of deeds, in the county where such lands or hereditaments are lying and being, within six months after the execution of such deeds and conveyances." The section further provided that every deed and conveyance not so recorded should "be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such deed or conveyance be recorded as aforesaid before the proving and recording of the deed or conveyance under which subsequent purchaser or mortgagee shall claim." By the Act of May 19, 1893, P. L. 108, Sec. 1, this section was amended by changing the period of six months to ninety days, and by making deeds and conveyances made and executed within this Commonwealth and not recorded within that time after execution fraudulent and void against any subsequent purchaser or

mortgagee for a valid consideration, or any creditor of the grantor or bargainor, in said deed or conveyance. And in the amending act, the clause "unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which subsequent purchaser or mortgagee shall claim," was entirely omitted.

In *Fries v. Null*, 154 Pa. 573, a case which arose and was decided before the passage of the Act of 1893, an owner of real estate had executed and delivered a mortgage, which was not recorded until six months and two days after its execution. Four days after the execution of the mortgage, the mortgagor executed and delivered to a person other than the mortgagee a deed for the mortgaged premises. This deed was put on record within six months after its execution, but not until the day after the mortgage had been recorded. The question therefore arose whether a mortgage recorded more than six months after its execution had priority over a subsequent deed recorded within six months, but not until after the mortgage was on record. It was held that the mortgage had priority. Mr. Justice MITCHELL filed a dissenting opinion (p. 581), in which Mr. Justice WILLIAMS concurred, in which he characterized the decision as "revolutionary in its effect on title to land under the recording acts." In his view the intention of the act was, that a deed or conveyance recorded within six months should have priority over one not recorded until after the expiration of that period, and that (p. 582) "it is only when by the delay of both parties, two deeds are both outside of the term, that it becomes a race between them which shall get on record first."

In the present case, the court below calls attention to the fact that the decision in *Fries v. Null* was rendered May 8, 1893, and the act amending the Act of 1775 was approved on May 19, 1893, eleven days later, and the court says, "I take it that the omission by the legislature [of the clause quoted above] was for the reason that it

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decided to change the law as set forth in the case of *Fries v. Null*." No other conclusion can be drawn from the Act of 1893. It clearly operates as a repeal of the final clause of the first section of the Act of 1775. In *Reid v. Smoulter*, 128 Pa. 324, Mr. Justice CLARK said (p. 333): "A statute amendatory of another, declaring that the former shall read in a particular way, must, in general, be held to repeal all provisions not retained in the altered form. All matters not incorporated into the amendment, the latter must be held to have repealed." To the same effect, see *Luzerne Water Co. v. Toby Creek Water Co.*, 148 Pa. 568, 570; *Sener v. Ephrata Boro.*, 176 Pa. 80; *In re Martin*, 209 Pa. 266, 268.

In construing the Act of 1893, in the case of *Davey v. Ruffell*, 162 Pa. 443, the opinion concludes as follows (p. 451): "It results from this examination of the Act of 1893 that it is effective to change the law as it stood before, in only one particular, viz: it reduces the time within which a purchaser must record his deed from six months to ninety days. In all other respects the law remains as it was before." This was clearly an inadvertent statement. The question of the effect of the omission from the Act of 1893 of the final and qualifying clause of Section 1 of the Act of 1775 was not involved in *Davey v. Ruffell* and was not considered in the opinion of this court in that case. The law was carefully and deliberately changed by the Act of 1893, and, as it now stands, deeds and conveyances made and executed within this Commonwealth, are required to be recorded within ninety days after execution, and every such deed or conveyance not recorded within that time is fraudulent and void as to subsequent purchasers or mortgagees.

The agreement of sale under which defendant claims title was not recorded within ninety days after its execution. Therefore, by the terms of the statute, it is void as against plaintiff's deed, which was executed subsequently and for a valid consideration, and was recorded within ninety days from the date of its execution. It is ex-

pressly set forth in the case stated that, at the time when plaintiff agreed to purchase, she had no actual knowledge of any prior agreement for the sale of the property. Defendant's agreement was not then on record and it was not recorded until after the expiration of the ninety-day limit.

It would seem to be desirable that no extension of time should be allowed for the recording of deeds or conveyances, and that priority should be given to the instrument first placed upon the record. But that is, of course, a matter entirely for the legislature.

The judgment is affirmed.

Waltosh, Appellant, v. Penna. R. R. Co.

Negligence—Railroad crossings—"Stop, look and listen"—Presumption—Contributory negligence—Burden of proof—Nonsuit—Evidence—Leading question.

1. While the plaintiff is bound to prove negligence on the part of defendant in an action for personal injuries and that this negligence was the cause of the injury, he is not bound to go further and prove that he did not contribute to the result by his own negligence. That burden is on defendant unless the evidence produced discloses contributory negligence.

2. The rule of *Carroll v. Penna. R. R. Co.*, 12 W. N. C. 348, applies only where a person enters upon a railroad track, and is struck by a moving train so instantaneously as to raise a legal presumption that he did not stop, look and listen, and to rebut any presumption that he had done so. Where there is a doubt as to the negligence upon the part of the plaintiff, the case is for the jury.

3. In an action against a railroad company to recover damages for personal injuries sustained in a grade crossing collision, where it appeared that at the place where the accident occurred the defendant maintained six tracks, and that approaching the tracks from the direction from which the plaintiff came there were two side tracks, an open space twenty-four feet in width, and then four main tracks; that as plaintiff approached the side tracks he stopped and looked up and down the tracks and waited for a freight train to pass; that he then crossed the side tracks, and while in the

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space between the side tracks and main tracks looked up and down and heard no train coming but did not stop, although there was sufficient space for him to do so; that the rear of plaintiff's sled was struck just as it was about to cross the far rail of the last main track, the question of plaintiff's contributory negligence, including the question whether he should have stopped again after entering upon the side tracks, is for the jury.

4. The common law rule is that a question is leading where it embodies the material facts, and admits of an answer by a simple affirmative or negative; but in modern times this rule has been somewhat departed from by a number of decisions which hold that such a categorical question is not necessarily leading, providing of course that it is not so framed as to give an intimation as to which answer is desired.

5. Where in an action for injuries sustained at a railroad grade crossing plaintiff's counsel asked "Did you hear any train coming down?" and plaintiff answered, "No." and thereupon plaintiff was asked "Did you listen for a train coming down?" the contention that the question was leading was without merit, and the court erred in sustaining an objection thereto.

6. In such case the question "Were you in a position where you could have heard the whistle of that train if it had been blown," put to one of plaintiff's witnesses on direct-examination, does not indicate the answer desired and therefore is not leading and was erroneously excluded by the trial judge.

Argued Sept. 25, 1917. Appeal, No. 149, Oct. T., 1917, by plaintiff, from order of C. P. Cambria Co., Sept. T., 1913, No. 248, refusing to take off a nonsuit, in case of William Waltosh v. Pennsylvania Railroad Company, a corporation. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Reversed.

Trespass to recover damages for personal injuries. Before STEPHENS, -P. J.

The tracks referred to by number in the opinion of the Supreme Court are the main tracks. Track No. 4 is the last main track in the direction in which plaintiff was proceeding. Further facts appear by the opinion of the Supreme Court.

The trial judge entered a compulsory nonsuit, which

Assignment of Errors—Opinion of the Court. [259 Pa. the court in banc subsequently refused to take off. Plaintiff appealed.

Errors assigned were rulings on evidence and the refusal of the court to take off the nonsuit.

Walter E. Glass, specially admitted pro hac vice, for appellant.

F. J. Hartmann, for appellee.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

Counsel for appellant complains of the refusal of the court below to take off a judgment of compulsory nonsuit, which was entered upon the ground that plaintiff did not "stop, look and listen" before entering upon a grade crossing of defendant's railroad, and was, therefore, guilty of contributory negligence.

It appears from the evidence that, at the place where the accident occurred, the defendant company maintains six tracks. Approaching the railroad from the south, at that point, as did plaintiff, one would find two side tracks, then an open space some twenty-four feet in width, and then four main tracks.

Plaintiff testified on his own behalf that, on the night of the accident, as he came down the street to the railroad, and approached the side tracks, he stopped on the south side, and looked up and down the track. He waited until a freight train had passed and then crossed the side tracks. Between the side tracks and the main tracks there was sufficient space for a wagon to stand. Plaintiff said that when he passed over the side tracks, he looked up and down the tracks, and heard no train coming down. When asked by his counsel if he listened for a train coming down, the question was excluded, as being leading. Plaintiff testified further that, while he was passing over the crossing, he listened and looked up. The weather was thick, snowing and sleeting and driving

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in his eyes. While plaintiff was on the crossing, he heard no train coming, nor did he see one. When his horse was on track No. 4, a man, who was crossing before him, called to him that a train was approaching. The sled was still on track No. 3. He struck the horse and it jumped across, but the train caught the sled in the rear and dashed it against the telephone pole, and threw him against the pole hard enough to inflict severe injuries. He did not see the train until he was caught by it. No bell was rung as the train approached the crossing, nor signal given by whistle. No witness, except plaintiff himself, testified as to whether he stopped, looked and listened. He spoke English imperfectly, and the testimony above cited was given through an interpreter.

In the opinion refusing to take off the nonsuit, the court below said: "The plaintiff in the present case had within his own knowledge all the facts and circumstances upon which he relied, among which was that of whether or not he stopped, looked and listened at the proper time and place. We hold that the burden of establishing these facts was upon the plaintiff, and having failed to disclose the fact that he listened for approaching trains immediately before entering upon the grade crossing over the main line track the conclusion is that he did not perform the duty upon him, that is to stop, look and listen, and therefore he could not, under the law, recover from the defendant company for the injuries sustained, regardless of the negligence of said company, and it was the duty of the court to so inform the jury or to sustain a motion for a compulsory nonsuit." This view of the law placed upon the plaintiff the burden of showing as part of his case, that he was not guilty of contributory negligence. The law does not go that far. In *Ely v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.*, 158 Pa. 233, a grade crossing case, where the defense was that plaintiff had failed to observe the rule requiring him to stop, look and listen, it was said (p. 238): "In

cases like the present, the plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it. Unless, therefore, his negligence appears affirmatively, he is entitled to go to the jury on the general presumption against it."

In *Coolbroth v. Penna. R. R. Co.*, 209 Pa. 433, Mr. Justice DEAN said (p. 439): "She [plaintiff] is bound to prove negligence on the part of defendant and that this negligence caused her injury; she is not bound to go further and prove that she did not contribute to the result by her own negligence. That burden is on defendant, unless the evidence adduced by her discloses contributory negligence."

In the present case, it will be noted plaintiff testified that, before going upon the tracks, he stopped and looked, but did not expressly say that he listened. The act of stopping and looking up and down the tracks to see whether a train was approaching, would naturally involve listening for the train. As was said by Mr. Justice STERRETT in *Penna. R. R. Co. v. Werner*, 89 Pa. 59, 65, "To conclude that he did not listen while standing there, would require a strained and unnatural inference. The presumption would rather be that he did listen as well as look." While the testimony of plaintiff did not show affirmatively that he listened, yet it did not show that he had not listened. As the case stood at the close of the testimony, it was for the jury.

It may very well be that, in the exercise of reasonable prudence, plaintiff should have stopped, looked and listened again, after crossing the side tracks and before going upon the main tracks. He said there was sufficient space between the tracks for him to do so. He testified that, before going on the main tracks, he again looked up and down the tracks, but did not say he stopped while doing so. He also said that he listened and looked up "while passing over the crossing," without stating at what point. Whether or not plaintiff should have stopped again after entering upon the

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tracks, was, under all the circumstances, a question for the jury: *Moore v. Penna. R. R. Co.*, 242 Pa. 541; *Witmer v. Bessemer & Lake Erie R. R. Co.*, 241 Pa. 112.

Counsel for appellee cites and relies on the well-known case of *Carroll v. Penna. R. R. Co.*, 12 W. N. C. 348, but the facts of the present case do not bring it within the doctrine there laid down, for the reason that plaintiff's horse had safely passed over the track when the accident occurred, and his sled was struck at the rear end. In *Howard v. B. & O. R. R. Co.*, 219 Pa. 358, 360, we state that, "We have said many times that the rule set forth in *Carroll v. Penna. R. R. Co.*, 12 W. N. C. 348, is in its nature only applicable to clear cases. It applies only where a person enters upon a railroad track, and is struck by a moving train so instantaneously as to raise a legal presumption that he did not stop, look and listen, and to rebut any presumption that he had done so. Where there is doubt as to negligence upon the part of the plaintiff, the case is for the jury. In the present case, it appears from the evidence that the horses of the plaintiff, instead of being struck immediately upon going upon the track, were not struck at all, but his wagon was struck at the rear end, just as it was leaving the track." The rule in the *Carroll* case was, therefore, held not to be applicable, and it is manifest that, for the same reason, it does not apply to the case at bar.

In the seventh assignment of error it is alleged that the court below erred in sustaining an objection to a question put to plaintiff by his counsel. He had testified that, when he came to the main tracks, he looked both up and down the track to see whether he could cross. Then his counsel asked: "Did you hear any train coming down?" He answered, "No," Counsel then asked: "Did you listen for a train coming down?" This question was objected to as leading and was excluded. A leading question is one which suggests to the witness the answer desired. There is nothing in the form of this question to indicate the desire of the examiner. That it

is categorical, and may be answered either "Yes" or "No," does not necessarily make it leading. In 40 Cyc. L. & Pr. 2423, it is said: "The common-law rule is that a question is leading where it embodies a material fact and admits of an answer by a simple affirmative or negative; but in modern times this rule has been somewhat departed from by a number of decisions which hold that such a categorical question is not necessarily leading, provided of course that it is not so framed as to give an indication as to which answer is desired."

Complaint is also made of the exclusion of a question put to plaintiff's witness McHally, as follows: "Were you in a position where you could have heard the whistle of that train if it had blown?" This question does not indicate the answer desired, and, therefore, was not leading. The inquiry was proper and should have been permitted.

The second, fourth, fifth, seventh and eleventh assignments of error are sustained, and the judgment is reversed with a procedendo.

Pennsylvania Engineering Works et al. v. New Castle Stamping Company.

Corporations—Receivers—Payments—Losses—Issue of unauthorized certificates—Surcharge—Payments directed by order of court—Subsequent order—Priority.

1. Where a business is being conducted at a loss a receiver cannot take advantage of his position and pay himself in full at the expense of other creditors, as his equity is not superior to theirs.

2. A receiver may properly be surcharged for the amount paid by him on unauthorized certificates and for the amount expended by him in repayment of money borrowed without authority.

3. Where the proceeds of unauthorized certificates and notes went into the business, a receiver surcharged therefor has an equitable claim equal to that of other creditors, but is not entitled to priority.

4. An order of court directing a receiver to continue the business, implies the authority to purchase supplies necessary for that purpose.

5. A receiver is not personally liable merely because the business may have been conducted temporarily at a loss, especially where he acted in good faith and the loss did not result from his misconduct or negligence.

6. While a receiver will be held to a rigid accountability, nothing more is required of him than that he act in good faith and exercise the discretion and prudence of ordinarily careful men in pursuits of similar character.

7. Where an order of court expressly charges the funds in the receiver's hands with the payment of authorized certificates, the payment thereof should be made to the holders prior to the receiver's commission fixed by a subsequent order of court.

8. Upon exceptions to the report of an auditor to pass upon the account of a receiver, it appeared that the receiver had continued the business under an order of court, that in some months there were losses and in others profits, but that there was a total loss in the conduct of the business during the receivership, the auditor found that some of the expense incurred in closing out the business might have been eliminated by winding up the business at an earlier date, but there was no finding as to the amount of loss thereby sustained, and no sufficient evidence upon which such a finding could have been based. There was no sufficient evidence to indicate want of proper care and attention to the business on the part of the receiver. *Held*, the receiver was improperly surcharged for the amount of the loss under the receivership.

9. In such case where the fund for distribution was not sufficient to pay in full all the preferred claims, an order was made directing payment in full of local taxes, expenses of the audit, costs of appeal, counsel fees, payment of certificates authorized by the court, and after the payment of such special claims directing the balance to be distributed to the receiver to apply upon his claim for compensation and for the amount paid a watchman whose appointment had been authorized by the court.

Argued Oct. 2, 1917. Appeal, No. 7, Oct. T., 1917, by George W. Johnson, Receiver, from decree of C. P. Lawrence Co., March T., 1908, No. 1, in equity, dismissing exceptions to auditor's report, in case of Pennsylvania Engineering Works and R. C. Patterson v. New Castle Stamping Company. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Reversed.

Bill in equity for the appointment of a receiver.

Exceptions to report of Charles R. Davis, Esq., Auditor. Before EMERY, P. J.

From the record it appeared that the New Castle Stamping Company was a Pennsylvania corporation chartered in 1901, and engaged in the manufacture of enamel ware in New Castle, Pennsylvania. It became so financially embarrassed that on December 7, 1907, on the petition of certain stockholders and creditors, George W. Johnson was appointed receiver. Its indebtedness was about four hundred thousand dollars, which included one hundred and fifty thousand dollars of first mortgage bonds issued in 1905. During the six years of its operation, prior to the appointment of the receiver, the corporation had lost on an average about sixty thousand dollars a year. The order appointing the receiver directed the completion of unfinished work. At that time the assets, aside from the real estate, were inventoried at \$42,531.02. The plant employed about two hundred men and it was desired by the parties in interest that it be kept a going concern. On December 20, 1907, on the receiver's petition, the court below entered a decree, "that it is for the best interest and advantage of the creditors and stockholders of the New Castle Stamping Company that the said company's plant be operated by George W. Johnson, Receiver, under the direction of the court and to enable him to operate the same that he purchase such supplies and materials as are necessary, and to that end the court do adjudge and decree that the said receiver be and he hereby is authorized, empowered and directed to issue receiver's certificates to an amount not exceeding thirty thousand dollars. Said certificates shall be a lien prior to all other liens, except to the lien of the first mortgage now upon the properties of said New Castle Stamping Company, which lien shall not be prejudiced hereby, upon all the goods, properties, assets, lands and tenements of New Castle Stamping Company and shall be paid first before any other claim against the New Castle Stamping Company,

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out of the moneys realized from the sale of the goods, chattels, land and tenements of the said New Castle Stamping Company, which said goods and chattels, lands and tenements, subject to the lien of the said first mortgage, are hereby placed and directed to be held by the receiver as security for the payment of the certificates of indebtedness issued in pursuance of this decree.

"The court further adjudge and decree that it is for the best interest of the said company that the plant be continued as a going concern and to that end the receiver is authorized, empowered and directed to purchase, from time to time, such materials and supplies as are necessary for the operation of said plant and to complete the manufacture of the goods now on hand and to continue the operation of the plant until further order of the court, and to place the goods so manufactured on the market, keeping an account of all moneys by him received and keeping the same deposited to his account as receiver, using the same from time to time only under the authority of the court.

"It is further ordered that the said receiver on or before the second Monday of each month during the receivership, and until further order of the court, shall file in this case a written statement under oath showing the amount of purchases made by him, the amount of moneys expended by him, the amount of goods sold and the amount of moneys by him so received."

The receiver issued certificates for the thirty thousand dollars, and also issued additional certificates amounting to five thousand nine hundred dollars without authority; the proceeds of all of which were used in the business. He expended over nine thousand dollars in necessary repairs and improvements, paid bills, current when he took the plant, and continued its operation. The receiver kept full and accurate accounts but not so as to show at a glance the status of the business, there being no separate record of trial balances or of profit and loss. He failed to file the monthly statements as re-

quired by the order of court, being advised by his counsel that only an annual statement was necessary. In February, 1909, he filed a statement of the business up to December 31, 1908. For that period the books showed a gain of \$8,496.18, and for the year 1909 a loss of \$1,012.65. The year 1910 proved disastrous to the enterprise. As early as February of that year the receipts of the plant were not sufficient to defray its expenses and the receiver began borrowing money on his own notes to enable him to keep the plant going. This he continued from month to month until he had so borrowed and expended \$16,000.00; and the accounts of the receiver showed a loss for each month of that year, except February and March. The entire business of the receiver to May 31, 1910, showed a net gain of \$1,588.27; but the succeeding months proved more unfavorable until the plant was practically closed on October 15, 1910. George L. Patterson of New Castle was a large stockholder of the corporation and president thereof during its entire existence and took a great interest in its affairs. It was at his instance that Johnson accepted the receivership; and thereafter they frequently conferred together with reference thereto. During the summer of 1910 the receiver was in ill health and sought to be relieved of the receivership; and on that subject had repeated interviews and some correspondence with Patterson, who tried to find some suitable person who would relieve Johnson; and gave the latter assurance that he would be relieved on the return of the judge, who was temporarily absent from the district. Patterson and other stockholders and creditors earnestly urged that in the meantime the receiver should keep the plant a going concern, which was done until October 15th, but no other receiver was appointed. Prior to closing the plant, and largely during the year 1910, the receiver became indebted to various parties for material and supplies furnished the plant amounting in all to \$30,440.00, which indebtedness has never been paid,

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During the receivership the plant did business with other concerns in which the receiver was more or less interested, but those transactions appear to have been fair and without prejudice to the New Castle Stamping Company. After the plant closed it did some work on brass shells for another company, but the receiver was paid therefor, and, as it was necessary to keep the plant open in winding up its other business, this does not seem to have been prejudicial to the receiver's trust. After the plant was closed, the receiver made disposition of the personal estate from time to time at private sale, and collected the accounts, and later by order of court made public sale of the plant for a nominal sum, subject to the mortgage. In winding up the business after the plant was closed, there was apparently a loss of \$40,-041.18; some of which the auditor found might have been avoided had the receiver sought an order of court and made prompt sale of the remaining assets. The evidence indicated that a considerable loss would be the natural result of closing the plant and disposing of its property.

During the summer and fall of 1910, while the plant was losing money, and when it was doubtful whether the assets were sufficient to pay the expenses of the receivership and the debts incurred by the receiver, he used the receipts of the business to pay in full the certificates he had issued without authority and also to repay the amounts he had borrowed and put in the business earlier in the year, and left unpaid the claims of other creditors as above mentioned and also six thousand dollars due the National Bank of Lawrence County on certificates properly issued by him. The receiver testified that he did not know until January, 1911, that the assets were not sufficient to pay all of the debts and expenses of the receivership. In 1913, the court which appointed the receiver, after an exhaustive investigation, not only found that he acted in good faith but that he was diligent in the care and preservation of the property, and fixed his com-

pensation at fifteen thousand dollars, and decreed the same to be a first lien upon the plant. The receiver filed his final account in 1913 showing receipts and disbursements of approximately six hundred thousand dollars and a balance due him of \$16,420.16. To this account numerous exceptions were filed by creditors and other interested parties. Charles R. Davis, Esq., was duly appointed auditor to pass on the exceptions, and, after taking testimony and full consideration, filed an elaborate report covering one hundred and seventy-seven pages. This appeal was taken by the receiver from the decree of the court dismissing exceptions filed to and confirming that report.

The opinion of the Supreme Court further states the facts.

The court dismissed the exceptions. George W. Johnson, Receiver, appealed.

Errors assigned were in dismissing the exceptions.

Robert K. Aiken, with him *James A. Gardner*, for appellant.—The receiver was wrongfully surcharged with the amount of the losses incurred by him in operating the plant, there being no evidence that the receiver acted in bad faith or that he failed to exercise the discretion or prudence of ordinarily careful men: *McDowell's App.*, 4 Penny. 384; *Chapman v. Atlantic Trust Co.*, 119 Fed. R. 257.

The receiver was entitled to be reimbursed for the money advanced by him in operating the business: *Walter v. W. Branch Table & Furniture Co.*, 12 Dist. Rep. 529; *Cake v. Mohun*, 164 U. S. 311; *Mustin's Est.*, 188 Pa. 544; *Bentley's Est.*, 196 Pa. 497; *Donnelly's Est.*, 246 Pa. 308; *Re British Power, Traction & Light Co.*, 1 Chan. Div. Law. Rep. 497, 1906; *Burt et al. v. Bull*, 1 Q. B. 276, 1895; *Strapp v. Bull et al.*, 2 Chan. Div. 1, 1895.

Wylie McCaslin, with him *Leonard M. Uber*, *James A. Chambers*, *W. D. Wallace*, *Homer C. Drake*, *Martin & Martin*, *E. M. Underwood* and *H. K. Gregory*, for appellees.—The receiver was careless in the management of his trust and was properly surcharged: *Gutterson & Gould v. Lebanon Iron & Steel Co.*, 151 Fed. Rep. 72; *Decker v. Berners Bay Mining Co.*, 2 Alaska 504; *Fleming v. Hotel Co.*, 70 N. J. Eq. 509; *Matter of Punnet Cycle Mfg. Co.*, 24 N. Y. Misc. 310; *Gillespie et al. v. The Blair Glass Co.*, 189 Pa. 50; *First Natl. Bank v. Barnum Wire & Iron Works*, 27 N. W. 657; *Continental Trust Co. of New York v. Toledo, Etc., R. R. Co.*, 59 Fed. Rep. 514.

The receiver had no right to prefer himself in the repayment of notes for money advanced by him: *Johnson v. Gunter*, 69 Ky. 534; *Union Trust Co. v. Illinois, Midland Ry. Co. et al.*, 117 U. S. 434; *Chicago Vault Co. v. McNulta*, 153 U. S. 554; *Peoria Steam Marble Works v. Hickey*, 110 Ia. 276; *Morgan & Co. v. Texas, Etc., Railway Co.*, 137 U. S. 171; *Farmers L. & T. Co. v. B. & M. Tel. Co.*, 148 N. Y. 315; *Lewis v. Linden Steel Co.*, 183 Pa. 248.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

The auditor surcharged the receiver, *inter alia*, with the amount paid by him on the unauthorized certificates and also with the amount expended by him in repayment of the money borrowed in 1910; those items making a surcharge of \$22,287.16, including interest paid; and as to that amount allowed the receiver to pro rate with his general creditors. As to this we fully agree with the auditor, for where the business is being conducted at a loss a receiver cannot take advantage of his position and pay himself in full at the expense of other creditors, as his equity is not superior to theirs. In such case the debts can only be paid *pro rata*, and, if paid in full, the receiver will be personally liable: 4 *Cook on Corporations*, Sec. 878; *Gutterson and Gould v. Lebanon Iron &*

Steel Co., 151 Fed. Rep. 72; Alderson on Receivers, Sec. 239. The receiver was personally liable on the certificates and notes which he had given without authority; and, as the proceeds thereof went into the business, he had an equitable claim equal to that of other creditors, but is not entitled to priority: Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434; Nessler v. Industrial Land Development Co., 65 N. J. Eq. 491; Peoria Steam Marble Works v. Hickey, 110 Ia. 276. And see Gluck and Becker on Receivers, Sec. 96; also Pangburn v. American Vault, Safe & Lock Co. (No. 1), 205 Pa. 83.

The auditor also made the further surcharge: "To amount of loss in operating plant. . . . \$53,651.50."

This amount is less than the actual loss sustained after February 1, 1910, in the conduct of the business and the winding up thereof, and is fixed at that sum seemingly to create a fund sufficient to meet the deficiency and enable the receiver to pay all the outstanding debts and expenses of the receivership. In effect it makes him personally liable for such debts and expenses. In our opinion the facts found by the auditor do not justify such conclusion.

The order to continue the business implied the authority to purchase supplies necessary for that purpose: Alderson on Receivers, Sec. 245. As a general rule a receiver is not personally liable for debts contracted by him in the conduct of the business, except in case of personal misconduct or negligence: 3 Cook on Corporations, Sec. 878; High on Receivers, Sec. 272; 34 Cyc. 294; 23 Am. & Eng. Enc. of Law (2d Ed.) 1096.

True, he conducted the business several months at a loss, but he had had good months and bad months previously and it probably could not be determined at the end of one or two unfavorable months that the business would prove disastrous. The owners of the plant had operated it for six years at a loss and were not discouraged, and at this time were strenuously urging the receiver to keep it a going concern. He was then doing

an average amount of business, even in unfavorable times; and, while it may have been unwise to keep the plant going so long, yet under all the circumstances we cannot say that the receiver thereby made himself personally liable for all the unpaid debts of the receivership, most of which were contracted in the year 1910. There is no other ground on which to base such a liability.

A receiver is not personally liable merely because the business may have been conducted temporarily at a loss, especially where he acted in good faith, and the loss did not result from his misconduct or negligence: See McDowell's App., 4 Penny. 384. While the receiver will be held to a rigid accountability, nothing more is required of him than that he act in good faith, and exercise the discretion and prudence of ordinarily careful men in pursuits of similar character: 34 Cyc. 253. The auditor fails to find how much earlier, or when, the plant should have been closed, and we are unable to do so from the evidence. To say arbitrarily that the plant must close because its operation for one or two months indicates a loss, might stop the business before it got fairly started, or at any period of depression. We agree with the auditor that the receiver was chargeable with knowledge of the actual condition of the business as shown by the books, and also that he should be surcharged with so much of the loss as might have been prevented by proper care and attention to the business, but there is no finding as to how much of the loss if any could have been so prevented, and nothing to indicate want of proper care and attention, except that the business was for a time conducted at a loss.

On the question of closing out the business, the auditor finds that "some of the expense thus incurred might have been eliminated by winding up the business at once instead of continuing for so long a period," but makes no finding as to the amount of loss thereby sustained, and there is no sufficient evidence upon which such finding

can be made; and hence no basis for a surcharge. Neither is there proof or finding that any loss resulted from the receiver's failure to file the monthly statements as required by the order of December 20, 1907. To warrant a surcharge there must be loss resulting from misconduct. He is relieved of any charge of bad faith in that matter by the advice of his counsel. Taking as a whole the order of the court made December 20, 1907, we believe it authorized the receiver to pay current expenses, such as pay rolls, etc., without requiring in each instance a special order of court. It is of course a hardship for those who furnished supplies to the receiver in good faith to lose their claims; but it is also a hardship for the receiver, who in any event will sustain a considerable financial loss in addition to his time and effort, to pay such claims out of his own pocket. The auditor's fee was approved by the court below and we see no reason to change it. By striking out the surcharge for loss in operating the plant the fund for distribution will not be sufficient to pay in full all the claims allowed by the auditor as preferred. His allowance of the local taxes levied during the receivership as such is supported by *Gehr v. Iron Co.*, 174 Pa. 430. The expense of the audit, costs of this appeal, and also amount allowed as counsel fees should be paid in full as part of the costs. As the order of court expressly charges the funds in the receiver's hands with payment of the authorized certificates, the claim of the National Bank of Lawrence County thereon should be paid in full out of this fund; and it cannot be turned aside to pay receiver's commissions fixed by a subsequent order of court: See *Moore v. Lincoln Park, Etc., Co.*, 196 Pa. 519; and this is especially true because the receiver disbursed the funds in such manner as to render himself personally liable for the payment of the bank's claim, and cannot share in this fund until that is paid: See *Gillespie v. The Blair Glass Co.*, 189 Pa. 50. No objection seems to be here made to the preference given the claims of Chas. H. Johnson and

H. W. McAteer for balance of salaries. After payment of the special claims above mentioned, the balance of the fund in our opinion should be distributed to the receiver to apply upon his claim for compensation and amount paid watchman; as the court's order charges such claims upon the property, any right the receiver may have to look to the plant for the balance thereof should not be prejudiced. We have referred only to such of the numerous questions presented by the record as seem here important and deem it unnecessary to separately consider the assignments of error.

The decree of the court below confirming the auditor's report, is reversed, the surcharge of the receiver, "To amount of loss in operating plant, \$53,651.50," is set aside, and the record is remitted that redistribution may be made in accordance with this opinion, without prejudice to any right the receiver may have against the plant for the balance of his claim under the order of court making it a charge thereon. The costs of this appeal to be paid out of the fund for distribution.

**Faulk et ux. v. Duquesne Light Company,
Appellant.**

Negligence—Master and servant—Electric company—Wires—Defective transformers—Notice—Death of lineman—Presumption of care—Contributory negligence—Conflicting facts—Case for jury.

1. Where a lineman employed by an electric company is killed while working around live wires on a telegraph pole he is presumed to have used care.

2. Where the facts or inferences upon which the question of contributory negligence depends are in doubt, that question, if controlling, must be submitted to the jury.

3. In an action against an electric company to recover for the death of plaintiff's son, who was employed by defendant as a lineman, the question of defendant's negligence and the contributory negligence of the decedent are for the jury where it appears that

defendant's foreman, a vice-principal, directed decedent to connect certain wires at or near a transformer, which had been out of repair and in a leaky condition for some time and to such an extent as to electrify the metal case, of which fact defendant had notice; that decedent climbed the pole pursuant to such direction and immediately came in contact with the transformer, apparently by his arm touching the live case as he put it in the four-inch space between the case and the buck-arm while fastening his safety belt around the pole; that decedent had been employed as a lineman for from ten to twelve months and was ranked in the lowest of three classes of workmen as to experience and efficiency; and although he had been instructed as to the dangers of the business and warned not to touch a transformer case, he had not been warned of the defective condition of the transformer in question.

Argued Oct. 11, 1917. Appeal, No. 93, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., April T., 1915, No. 2074, on verdict for plaintiff, in case of Louis P. Faulk and Elizabeth A. Faulk, his wife, v. Duquesne Light Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Trespass to recover damages for the death of plaintiffs' son. Before EVANS, J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiffs for \$6,500, subsequently reduced to \$3,500, and judgment thereon. Defendant appealed.

Errors assigned were in refusing to direct a verdict for defendant, and in refusing to enter judgment for defendant n. o. v.

John G. Frazer, with him *Reed, Smith, Shaw & Beal*, for appellant.—The deceased was guilty of contributory negligence as a matter of law, and the court should have so instructed the jury: *McMellen v. Union News Co.*, 144 Pa. 332; *Lehigh Valley R. R. Co. v. Greiner*, 113 Pa. 600; *Weir v. Haverford Electric Light Co.*, 221 Pa. 611; *Lonzer v. Lehigh Valley R. R. Co.*, 196 Pa. 610; *Holland v. Kindregan*, 155 Pa. 156; *Walters v. American Bridge*

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Co., 234 Pa. 7; Hamilton v. Central R. R. of New Jersey, 227 Pa. 137; Schley v. S. & N. Y. R. R. Co., 227 Pa. 494; Cromley v. P. R. R. Co., 211 Pa. 429; Lerch v. Hershey Transit Co., 246 Pa. 473; Keiser v. Lehigh Valley R. R. Co., 212 Pa. 409.

Rody P. Marshall, for appellee.—The case was for the jury.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

This is an action by parents to recover damages for the death of an adult son. There is a line of poles in the Butler Pike in Allegheny County, used jointly by defendant and the Bell Telephone Company. One of said poles is located opposite the residence of a Mr. DeHaven and has three cross-arms; the lowest is used by the telephone company, the top by defendant for its high tension wires, and the middle, known as the buck-arm, is used by defendant for house wires. The transformer is contained in a metal case suspended from the upper cross-arm by iron hooks and comes down to within about four inches of the buck-arm. Its purpose is to reduce the current from 2,200 to 110 volts. The telephone company's messenger wire extends from the pole and is attached to it near the lowest cross-arm. It is considered a grounded wire, as is also an uninsulated guy wire fastened to the pole below the transformer. Plaintiff's son, Louis P. Faulk, was in defendant's employ as a lineman, and, on October 5, 1914, was directed by the foreman, who was in reality a vice-principal, to permanently connect some wires at or near the transformer. Young Faulk climbed the pole for that purpose and was immediately killed by an electric shock. No one saw the accident. Mr. Ford, a fellow lineman, was about fifty feet away, and, attracted by the noise, turned and saw Faulk in an upright position on the pole, and called twice to him but received no response. Ford then climbed the pole and found the deceased with his arms and safety

belt resting on the buck-arm, one foot fastened to the pole by a climber and the other resting on the messenger wire. The outside of Faulk's arm, below the elbow, and his feet were burned. The plaintiff's evidence tended to show that this transformer had been out of repair and in a leaky condition for some time, to such an extent as to electrify the metal case, of which the defendant had notice. It is reasonably certain that Faulk's death resulted from his arm touching the transformer case when his foot or feet were in contact with a grounded wire or some other conductor of electricity. Linemen are placed in three classes according to experience and efficiency. Faulk, who had from ten to twelve months' experience, was in the lowest class.

Defendant concedes that the question of its negligence was for the jury, but urges that the trial court erred in failing to hold that the deceased was guilty of contributory negligence. Defendant offered oral evidence, not controverted, to the effect that Faulk had been instructed as to the dangers of the business and warned not to touch a transformer case or messenger wire. However, he had not been warned of the defective condition of this transformer. He was sent to work in immediate proximity to high tension wires and a live metal case, with grounded wires near where he was required to stand, which made the place one of great danger. Under such circumstances the happening of the accident itself does not convict him of negligence. Careful and competent men are killed while working around live wires. No one knows just how the accident happened. The deceased is presumed to have used care. True, he was found with his foot on the messenger wire and it would seem that his arm had touched the transformer case; but it does not clearly appear that either act was done intentionally or negligently. A slight slip or misstep might easily have caused the accident. Both feet were burned while only one was found on the messenger wire, and this may have been by an involuntary movement after the shock. The

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transformer could be cut out by pulling the fuse plugs, but defendant's foreman testified that Faulk's first duty was to fasten his safety belt around the pole; and seemingly he was killed while attempting to do so. As there was a space of only four inches between the transformer case and the buck-arm, it is not remarkable that in pushing his belt around the pole his arm in some unexplained manner touched the live case. According to the evidence Faulk was sent to do work more dangerous than his experience justified, and his own negligence was not shown so clearly that it could be declared as matter of law. Where the facts or inferences upon which the question of contributory negligence depends are in doubt, that question if controlling must be submitted to the jury.

The assignments of error are overruled and the judgment is affirmed.

Puhlman et al., Appellants, v. Excelsior Express and Standard Cab Company.

Negligence—Master and servant—Cab company—Hire of team and driver—Driver assisting in hirer's work—Special and general employment—Negligence of driver—Injury to hirer's employee—Action against cab company—Respondeat superior—"Carriage cases" distinguished.

1. There can be no recovery against one charged with negligence upon the principle of respondeat superior unless it be made to appear that the relation of master and servant in fact existed, and that the servant was within the scope of his employment.

2. Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continues subject to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.

3. In an action against an express company brought by an employee of an electric company to recover for personal injuries, it appeared that the electric company had hired from the defendant

the services of a horse, wagon and driver to assist in the erection of poles and wires; that the defendant sent each morning to the electric company a man and wagon to remain in their service during the day; that the employees of the electric company rode in the wagon, and that the material to be used in putting up wires and poles was carried in it wherever occasion required; that the duties of the driver were to drive wherever he was directed by the electric company's foreman, to assist with the team in pulling down and putting up poles pursuant to the direction of the foreman; that the driver, in response to plaintiff's request to hand him a chisel, threw it to him in such a manner as to strike him on the knee, causing the injuries complained of. *Held*, the driver was under the direction and control of the foreman of the electric company and, therefore, in the latter's special employ at the time, and a compulsory nonsuit was properly entered.

4. Plaintiff failed to show affirmatively that handing tools from the wagon was a duty which defendant company engaged to perform, or that defendant employed the driver to discharge that duty.

5. The "carriage cases" are distinguished from this case by the fact that in those cases the driver is only under the control of the hirer to the extent of indicating the destination to which the latter wishes to be driven.

Argued Oct. 11, 1917. Appeal, No. 94, Oct. T., 1917, by plaintiffs, from judgment of C. P. Allegheny Co., July T., 1914, No. 2196, refusing to take off compulsory nonsuit in case of Edmund E. Puhlman, a Minor, by His Next Friend and Father, Carl H. Puhlman, and Carl H. Puhlman in His Own Right, v. Excelsior Express and Standard Cab Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Trespass for personal injuries. Before SHAFER, P. J.

The facts appear by the opinion of the Supreme Court.

The lower court entered a compulsory nonsuit which it subsequently refused to take off. Plaintiffs appealed.

Error assigned was in the refusal to take off the nonsuit.

Rody P. Marshall, of Rody P. & Meredith R. Marshall, with him Oliver K. Eaton, for appellants.—The driver

was an employee of the defendant at the time of the negligent act: *Caldwell v. Brown*, 53 Pa. 453; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Lewis v. Seifert*, 116 Pa. 628; *Mullan v. Philadelphia & Southern Mail Steamship Co.*, 78 Pa. 25; *Bentley, Shriver & Co. v. Edwards*, 100 Md. 652; *Laugher v. Pointer*, English Common Law Rep. Vol. II, 579; *Quarman v. Burnett*, Meeson & Welsby's Rep. (Exchequer) Vol. 6, 499; *Wallace v. Keystone Automobile Co.*, 239 Pa. 110.

The fellow servant rule is not applicable in the present case: *Murray v. Dwight*, 161 N. Y. 301; *Winona Technical Institute at Indianapolis v. Stolte*, 173 Ind. 39; *Otis Steel Co. v. Wingle*, 152 Fed. Rep. 914; *Coates v. Chapman*, 195 Pa. 109.

The driver was within the scope of his duty as an employee of the defendant: *Fuhrmeister v. Wilson et al.*, 163 Pa. 314; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Brannen*, 17 W. N. C. 227; *Guinney v. Hand*, 153 Pa. 404.

Where a question is a mixed question of fact and law it is for the jury: *Elmer v. Pittsburgh Railways Co.*, 251 Pa. 505; *Goehring v. Beaver Valley Traction Company*, 222 Pa. 600.

A. M. Thompson, of Gray, Thompson & Rose, for appellee.—The burden is upon the plaintiff to show that the negligent act upon which the complaint is based was performed by one who bore such relation to the defendant that the defendant is responsible for his negligent act under the doctrine of respondeat superior: *Rourke v. The White Moss Colliery Co.*, 2 L. R. C. P. D. 205; *Donovan v. Laing et al. Construction Co.*, 1 Q. B. (C. A.) 629.

The rule of the "carriage cases" does not apply to the present facts: *Byrne v. Kansas City, Etc., Co.*, 61 Fed. Rep. 605; *Powell v. Construction Co.*, 88 Tenn. 692; *Atwood v. Chicago, R. I. & P. Ry. Co. et al.*, 72 Fed. Rep.

447; Johnson v. Western New York & Penna. Ry. Co., 200 Pa. 314.

The driver was not acting within the scope of his authority at the time of the injury.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

Edmund E. Puhlman, an employee of the Duquesne Light Company, was injured through the negligence of one Joseph Elkman. Contending that the latter was at the time of the accident employed by the Excelsior Express and Standard Cab Company, and was acting within the scope of his employment, the plaintiff brought this suit against the cab company, to recover from it damages for the injury which he sustained. The facts were not in dispute, and, as stated by the court below, were as follows: "The Duquesne Light Company hired from the defendant the services of a horse, wagon and driver to assist in its erection of poles and wires. The method of procedure was for the defendant to send each morning to the place of business of the Duquesne Light Company, a man and wagon, which was to remain in their service during the day. The employees of the Duquesne Light Company rode in the wagon, and the material to be used in putting up wires and poles was carried in the wagon to wherever the Duquesne Light Company had occasion to work, and there the driver of the wagon did whatever he was directed to do in the use of the horse, unhitching it from the wagon so as to help arrange the poles, and going from place to place with the wagon as directed by the foreman of the Duquesne Light Company. The plaintiff having occasion to get a chisel, which had been brought out in the wagon, went to the wagon on which the driver was, and asked for the chisel. The driver thereupon picked it up and threw it to the plaintiff in such a manner that it struck him on the knee and caused a severe injury."

At the trial, a compulsory nonsuit was entered, upon the ground that the evidence showed that, when the acci-

dent occurred, Elkman was, for the time being, in the employ of the Duquesne Light Company, and not in that of defendant. From the refusal to take off the nonsuit, plaintiff has appealed. While Elkman was in the general service of the express and cab company, yet, in the opinion of the trial judge, it clearly appeared from the evidence that he was at the time in the particular service of the light company, and was under its direction and control. The trial judge, therefore, followed the general rule of law stated in 26 Cyc. L. & Pr. 1285, as follows: "Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." The same rule is formulated in the opinion in *Standard Oil Co. v. Anderson*, 212 U. S. 215, as follows (p. 220): "One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

In the present case, if plaintiff is to recover damages, it is incumbent upon him to show, by affirmative proof, that the person whose negligence caused the injury was the servant of defendant, and that the injury was inflicted while he was acting within the scope of his employment as such servant. Thus in *Patton v. McDonald*, 204 Pa. 517, we said (p. 523): "There can be no recovery against one charged with negligence upon the principle of *respondeat superior*, unless it be made to appear that the relation of master and servant in fact existed, whereby the negligent act of the servant was

legally imputable to the master." And in 7 Labatt on Master & Servant (1913), Sec. 2513, stating the principle, it is said: "The rule respondeat superior operates only in respect of cases in which it is established by affirmative testimony that, at the time when the given tort was committed, the relationship of master and servant, or of principle and agent, existed between the party whom it is sought to affect with liability and the actual tort-feasor. Accordingly, a plaintiff whose claim is founded upon the rule cannot succeed if the evidence is insufficient to prove that the tort-feasor was a servant of the defendant, or requires the inference that..... though regularly in the employ of the defendant, he was temporarily under the control of another person on the occasion when the injury complained of was inflicted."

In the case at bar, plaintiff depended for proof of the duties which Elkman had been employed to perform entirely on testimony as to what he actually did, with the exception of defendant's admission that he was in charge of the horse and wagon when the accident occurred. The evidence showed that Elkman did three things: (1) he drove the team wherever he was directed to go by the foreman of the Duquesne Light Company; (2) he assisted with the team in pulling down and putting up poles following the directions of the foreman in so doing; and (3) he handed out the tools to the workmen, when neither the foreman nor any other of the men was on the wagon.

The operation in which Elkman was concerned was conducted solely by the light company, and he was bound to obey the orders of its foreman in the work which he did. The defendant company gave up the right to control his movements during the course of the particular work in which he was engaged, and that right of control was in the light company.

Counsel for appellant have cited a number of decisions known as the "carriage cases," in which vehicles in care of a driver have been loaned or let by the owner to an-

other person. In such cases the general master is held to continue liable for his servant's negligence in driving, loading or unloading, though the latter takes his orders as to driving, or as to loading or unloading, from the party to whom the conveyance has been loaned or hired. An examination of all the cases cited to this effect shows that they were either instances where the accident was caused by negligent driving, or management of the vehicle driven, or in the loading or delivery of merchandise which the master had been employed to carry, and in none of them had the master parted with his control over his servant. *Wallace v. Automobile Co.*, 239 Pa. 110, is an example. Mr. Justice MESTREZAT there said (p. 117): "The rule of respondeat superior applies. The chauffeur and the car were furnished by the defendant company, and he had control of and operated the car for the company. The negligence of the chauffeur is the negligence of his employer, and for injuries resulting therefrom the latter is responsible."

In the case at bar the accident did not result from any negligence in driving or in the management of the horse and wagon. Nor can it be said that it resulted from negligence in unloading anything which defendant was employed to deliver. Elkman may at times have handed down tools from the wagon, but there is no evidence that the defendant company was under contract to carry or deliver any such tools. They were incidental to the work of the employees of the light company, and were evidently placed upon the wagon by the servants of that company, and, if the driver handed them out, it was merely as a convenience to the light company's foreman, when the latter was not himself there to perform that duty.

In *Donovan v. Laing et al.*, L. R. (1893), 1 Q. B. 629, cited by counsel for appellee, the distinction between the carriage cases and one like the present is pointed out by the Master of the Rolls, Lord Esher. As he says, the coachman is only under the control of the hirer to the ex-

tent of indicating the destination to which he wishes to be driven; and, in distinguishing the control of the owner in such a case from that in the instance before him, he said: "In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for the time."

In *Byrne v. Kansas City, Etc., R. R.*, 61 Fed. Rep. 605, cited by the court below, and referred to more fully in the argument for appellee, the carriage cases are distinguished, with the final comment that "It is manifest, therefore, that they have no application whenever it appears that the master has parted to another, for a time, with control over his servant, to be used in the work of that other."

Counsel for appellants contend that the question whether the negligent act of Elkman was within the scope of his employment by the defendant, was for the jury. But they offered no evidence sufficient to sustain a finding by the jury in their favor upon that question. They showed merely that defendant put Elkman in charge of the horse and wagon, and then placed him under the control and direction of the light company. They failed to show affirmatively that handing tools from the wagon was a duty which the defendant company engaged to perform, or that defendant employed Elkman to discharge that duty. The tools all belonged to the light company, and were manifestly under the control of its foreman. The case is essentially different from one in which a master contracts to haul and deliver goods, and sends his servant to perform that work for him. We think the evidence clearly justifies the conclusion that Elkman, while in charge of the horse and wagon, and while assisting the workmen of the electric light company, was under the direction and control of the foreman of that company, and that the defendant company did not retain control over him in the work he was doing at that time.

The assignment of error is overruled, and the judgment is affirmed.

Barclay's Estate.

Jurisdiction, O. C.—Decedents' estates—Domicile of decedent—Change of domicile—Evidence—Presumption against change—Probate of will.

1. A domicile once acquired is presumed to continue until it is shown to have been changed, and where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable, first, residence in the new locality, and, second, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change; until the new one is acquired the old one remains.

2. On an appeal from the probate of a will on the ground that deceased was not a resident of the State at the time of her death, it appeared that deceased died in Canton, Ohio, on November 18, 1915, leaving the testamentary paper in question dated December 13, 1915, with the addenda in her handwriting, "July 1, 1915, Pittsburgh, Pa., 1615 Buena Vista St., N. S." The will named a resident of Pittsburgh as the executor. It further appeared that deceased was born in Ohio, came to Pittsburgh in 1871, and lived there with her husband from that time until his death in 1878; that her husband's will was probated and his estate administered in Allegheny County; that decedent went to Paris in 1880 and lived there until 1904, when she went to New York City and lived until February, 1913; that she then furnished two rooms in a house owned by her in Canton, Ohio, and occupied by her cousin, and boarded with him until her death; that when she purchased the house in question in Canton it was her intention to have the deed made to her cousin but she was advised by counsel that she could as well give it to him by her will; that she was a member of a church in Pittsburgh; that her husband and one child and herself were buried in a cemetery near Pittsburgh; that in previous wills prepared for her in 1908 and 1911 the introductory clauses referred to Pittsburgh as her residence; that her bank account and investments were in Pittsburgh; and that while living in New York, Paris and Canton she had declared to a number of witnesses that she regarded Pittsburgh as her home and her stay in Canton as an experiment, and temporary; and that she made frequent visits to

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Pittsburgh while living at the other places named; while the only facts offered to show a change of residence were the purchase of the house in Canton and her living there in furnished rooms until her death, that she had registered on several occasions at the Y. W. C. A. building as residing in Canton, and her name appeared in the Canton directory as a resident. *Held*, the court did not err in finding that decedent was a resident of Pittsburgh at the time of her death, and the will was properly admitted to probate.

Argued Oct. 12, 1917. Appeal, No. 99, Oct. T., 1917, by T. E. Morrissey and her Co-Heirs at Law, from decree of Allegheny Co., June T., 1916, No. 508, dismissing appeal from decision of Register admitting will to probate in the Estate of Violet Irwin Barclay. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Appeal from decree of register admitting will to probate.

The facts appear from the following opinion by OVER, P. J.:

This is an appeal from the decision of the register of wills of this county admitting to probate on December 13, 1915, as the last will of Violet Irwin Barclay, deceased, a testamentary paper written and signed by her, having this addenda also in her handwriting: "July 1, 1915, Pittsburgh, Pa., 1615 Buena Vista St., N. S., Pittsburgh, Pa." She died at Canton, Ohio, on the 18th of November, 1915. The appellant alleges that Canton was her domicile, that the register of wills of this county had no jurisdiction to admit the will to probate, and under the pleadings this question of fact is submitted to this court for adjudication.

The decedent was born and raised near Dalton, Wayne County, Ohio, married Dr. George Barclay, a dentist, and lived with him at Dalton for some years. They came to Pittsburgh in 1871, where they kept house, and the doctor opened offices and practiced dentistry until his death in 1878. His will was probated and his estate ad-

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ministered in this county. Mrs. Barclay went to Paris about 1880 and lived there until 1904, when she went to New York City and lived there until February, 1913. She then furnished two rooms in a house owned by her in Canton, Ohio, occupied by her cousin, George B. Scott, and boarded with him until her death. Her intention when she purchased this house was to have the deed made to her cousin, but being advised by her counsel, George C. Wilson, Esq., of Pittsburgh, to take the title in her own name and that she could give the property to him in her will, she was named as grantee in the deed. In her will she made the following disposition of this property: "The home in Canton, Ohio, 800 Fourteenth St., N. W., I leave to my cousin, George B. Scott, and his wife, Martha P. Scott, my cousin. I wish my cousin, Mrs. Lois E. Glover, of Akron, to go there at any time feeling perfectly at home." Her name appears in the directory of the inhabitants of Canton for the years 1913, 1914 and 1915 as residing at No. 800 Fourteenth street, N.W. She was a member of a church in Pittsburgh and took a letter to Paris, joined a church there; also in New York City, and Canton, being a member of the latter church when she died. Her husband, one child and herself were buried in a cemetery at Beaver, Pa.

There can be no question that when Dr. Barclay died his wife's domicile was in this county, and the appellants offered no evidence as to declarations made by her showing an intention to change this domicile. The appellee, however, showed conclusively, both by her written and oral declarations, that she did not intend to change it. In 1908 when she resided in New York City, her counsel, Mr. Wilson, prepared a will for her, the introductory part being as follows: "I, Violet I. Barclay, of Pittsburgh, Pennsylvania." In 1909 he prepared another for her from instructions received from her in New York City, having the same introductory clause, which he sent her. In 1911 he prepared another for her in New York City, having the same introductory clause, she writing

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his name in it as executor. When living in New York she had written Mr. Wilson a letter in which she stated she wanted him to act as her executor and he testified: "I had a talk with Mrs. Barclay and I said to Mrs. Barclay, 'Mrs. Barclay, you are in New York now. I live in Pittsburgh, Pennsylvania. Of course I can't act as your executor if your home is in New York,' and she said, 'Oh, my home is in Pittsburgh,' and then in that conversation and in later conversations she oftentimes told me why she said her home was in Pittsburgh. Among the reasons given by Mrs. Barclay were these: She said to me on many occasions that they lived here in Allegheny County and kept house here in Allegheny County and really had no home after they left Allegheny County; that her husband was in business here; that their burial lot was near Pittsburgh in Beaver. She told me that her husband was buried there and that her only child was buried there and of course she would be buried there. She said, 'All the moneys and securities that I have are in Pittsburgh, most of my investments are local to Pittsburgh.' She said, 'My bank account or bank accounts'—she had two accounts—'my bank accounts are in Pittsburgh,' and she said to me several times that her closest friends were in Pittsburgh." He also testified that she talked with him about going to Canton, saying "she would go out and try it but it was an experiment." She later said her stay there was very unsatisfactory. A number of other witnesses also testified to declarations made by her whilst living in New York City, Paris and Canton "that Pittsburgh was her home" and that her living in Canton was an experiment and temporary. She came to Pittsburgh frequently whilst living in New York, Paris and Canton and usually stopped at the Y. W. C. A. building.

In discussing the question of domicile in *Mitchell v. United States*, 21 Wall. 350, it was said: "A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is al-

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leged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality, and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired the old one remains." In *Price v. Price*, 156 Pa. 617, the decedent was a native of West Chester, Chester County, Pennsylvania. It was conceded that he acquired a domicile of choice in Philadelphia and later acquired a domicile of choice in New York City. It was alleged that he abandoned his New York domicile and resumed his domicile of origin. It appeared that he actually returned to West Chester and resided there until he died, leaving a will good in Pennsylvania and not in New York. The jury found that the decedent did not abandon his New York domicile and did not come to West Chester with the intention of making his permanent home in Pennsylvania, and Mr. Chief Justice STREBETT, in affirming the lower court, said that the prior domicile must be presumed to continue "until another sole domicile has been acquired by actual residence coupled with the intention of abandoning the domicile of origin. This change must be *animo et facto*, and the burden of proof is on the party who asserts the change." In *Jacobs on the Law of Domicile*, Sec. 125, it is said: "All jurists agree that a change of domicile of whatever grade is a question of act or fact and intention and cannot be accomplished without the concurrence of both," and sec. 122, "A change of domicile is always presumed against."

Then, as here the evidence shows conclusively that Mrs. Barclay's domicile was in this county when her husband died, under the authority of these and other cases,

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it seems the burden of proof is on the appellant to show that her domicile was changed to Canton, Ohio.

The only facts tending to show such a change are that she purchased a house in Canton, lived there as a boarder in rooms furnished by her from February, 1913, until her death, had her household effects there, was registered on several occasions at the Y. W. C. A. building as residing in Canton, and her name appears in the Canton directory as a resident.

Any inference as to an intention to change her domicile by the purchase of the house is rebutted by the testimony showing she did not buy it as a home for herself but for her relatives. The other facts only show her residence in Canton and are immaterial, as it appears from the evidence adduced by the appellees that she never had any intention to change her Pittsburgh domicile.

The trial judge finds as a fact that Mrs. Barclay's domicile when she died was in the City of Pittsburgh, Allegheny County, Pennsylvania, and the appeal is therefore dismissed at the costs of appellant and the decision of the register of wills affirmed.

The lower court dismissed the appeal from the decision of the register. T. E. Morrissey and her coheirs at law appealed.

Error assigned, among others, was the decree of the court.

J. A. Wakefield, with him *J. F. McNaul*, for appellants.—The decedent was a resident of Canton, Ohio, at the time of her death: *Hampton v. McConnell*, 16 U. S. 234; *Chew v. Brumagen*, 80 U. S. 497; *Hancock National Bank v. Farnum*, 176 U. S. 640; *Carey's App.*, 75 Pa. 201; *Price v. Price*, 156 Pa. 617; *Whitney v. Inhabitants, Etc.*, 94 Mass. 111; *Barton v. Irasburgh*, 33 Vt. 195; *Raymond v. Leishman*, 243 Pa. 64.

M. W. Acheson, Jr., of *Sterrett & Acheson*, with him

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Wilson & Evans, for appellees.—The burden was on appellants to show a change of domicile, *animo et facto*: *Price v. Price*, 156 Pa. 617; *Mitchell v. United States*, 21 Wallace 350.

Domicile being a matter of intention, decedent's declarations are of great evidential value: *Chambers v. Prince*, 75 Fed. Repr. 176; *Eisele v. Oddie*, 128 Fed. Repr. 941; *Chase v. Chase*, 66 N. H. 588; *Harberger's Est.*, 13 Philadelphia 368.

Domicile is not to be inferred from the fact of residence: *Bell v. Kennedy*, Law Report, 1 H. L. Sc. 307; *Barton v. Irasburgh*, 33 Vt. 159; *Givernaud v. Variel*, 97 Atl. Repr. 49.

Where residence away from original home is temporary there is no change of domicile: *Malone v. Lindley*, 1 Philadelphia 192.

PER CURIAM, January 7, 1918:

The decree of the Orphans' Court is affirmed on the opinion of the learned judge, filed January 12, 1917, dismissing the appeal from the decision of the register of wills admitting to probate the last will and testament of the testatrix.

Oelrich v. Kent, Appellant.

Negligence—Automobiles—Standing trolley car—Alighting passenger passing around front of car—Collision with automobile between opposite bound tracks—Speed—Failure to blow horn—Cutting in front of street car—Contributory negligence—Case for jury.

1. No one can complain of want of care in another where care is rendered necessary only by his own wrongful act.

2. In an action against the owner of an automobile to recover for personal injuries the question of defendant's negligence and the contributory negligence of the plaintiff were for the jury and a verdict and judgment for the plaintiff will be sustained, where it appeared that plaintiff, after alighting from the front of a street car, which had stopped at a crossing, passed around in front of the

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car and had taken about two steps beyond it when he was struck in the space between the east and west bound tracks by defendant's automobile heading in the same direction as the car; that the automobile approached at a greater than usual rate of speed at that place without sounding its horn and just before striking plaintiff changed its course, running in close to the front end of the car in an effort to pass in front of it.

Argued Oct. 12, 1917. Appeal, No. 124, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny County, July T., 1916, No. 2029, on verdict for plaintiff in case of Carl Oelrich v. Edward J. Kent. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Trespass for personal injuries.

On the trial three witnesses testified that just before striking the plaintiff, defendant's automobile changed its course, and swerved in toward the front of the standing car in an effort to pass in front of it.

Further facts appear in the following opinion by MACFARLANE, J., sur defendant's motion for judgment non obstante veredicto:

Upon the motion for judgment n. o. v. the only question is the contributory negligence of the plaintiff. It is true defendant testified that his automobile did not run at a rate of more than ten miles an hour and that it stopped in five feet, and there was no opposing testimony fixing the higher rate, but there was testimony that the automobile ran twenty-five feet after it struck the plaintiff and that the speed was greater than the usual rate of automobiles at that place. The defendant's testimony is not conclusive for the additional reason that he is an interested witness and his son and another man who were said to have been in the automobile were not called. It further appeared without contradiction that a horn was not blown.

The plaintiff walked across the street in front of the standing street car from which he had alighted and, ac-

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According to the testimony of Mrs. Bernhardt, was struck on the space between the two tracks. She said he had passed the street car.

Q. About how far did he pass it?

A. Well, he had just started across the street.

Q. Where was he in respect to the front end of the street car?

A. He was in the front end. That is the way he got off.

Q. How many feet away from the front end was he?

A. I guess about two or three feet.

Q. How would you fix the point in relation to the other track, the westbound track?

A. Well, I guess he was about between the middle, you know that middle part between the two tracks. He was about there.

The plaintiff testified:

Q. How far had you proceeded past the front of the street car when you first saw the automobile?

A. Maybe one or two steps. I can't just exactly tell, it happened so quick.....

Q. After you had passed the front end of the car and taken a step or two as you said, were you or were you not looking in any particular direction?

A. Why, I looked up first and when I looked down I was so close to the automobile there was no way getting out of the way at all.

In another place he said:

Then after I passed the street car, maybe a couple of steps, I observed the car coming and I couldn't get out of the way and I got struck.

The space between the two tracks, called the "dummy," fixes the limit of the distance to which the plaintiff had advanced. The width of this space was not given, but it was well known to the jury. Fifth avenue runs by the court house where the trial was being held and is the most prominent street in this city. The overhang of a street car occupied a portion, and two ordinary steps would carry a man over the entire space. The only wit-

nesses who located the automobile with reference to the side of the street car were Miss Meyers and Mr. Kent, who both said that it ran on the street car track. Had it proceeded without deviation, it would be plain that the plaintiff had stepped past the dummy onto the westbound track. The testimony that the automobile turned to the right, towards the right-hand of the street so close that the witnesses thought it would hit the fender, with Mrs. Bernhardt's testimony, was sufficient to support the finding of the jury that the plaintiff was struck on the space between the two tracks.

He was not bound to guard against the negligence of the defendant. He had a right to presume that ordinary care would be used to protect him from injury. "No one can complain of want of care in another where care is only rendered necessary by his own wrongful act": *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354. The plaintiff's negligence was not a clear and unavoidable inference from the undisputed facts. In *Kurtz v. Tourison*, 241 Pa. 425, the plaintiff was struck by an automobile as she stepped from in front of a pair of standing horses, and the case was for the jury. In *Miller v. Tiedemann*, 249 Pa. 234, an automobile passed a wagon proceeding in front of it and, after clearing it, swung to regain the track, running 20 to 25 miles an hour, and no warning was given and after striking the man ran about 20 feet. It was argued that he was guilty of contributory negligence in stepping in front of a moving automobile, but the testimony that the driver could not see the man he struck until he was actually upon him and the latter could not see the driver until approximately the same time carried the case to the jury.

The oral argument and the briefs were confined to the motion for judgment, but we have considered the reasons assigned upon the motion for a new trial and find them without merit.

Verdict for plaintiff for \$8,500 and judgment thereon. Defendant appealed.

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Assignment of Error—Arguments.

Error assigned, among others, was in refusing defendant's motion for judgment non obstante veredicto.

W. S. Dalzell, of *Dalzell, Fisher & Hawkins*, for appellant.—Binding instructions should have been given for the defendant: *Cunningham v. P. R. T. Co.*, 240 Pa. 194; *Crooks v. Pittsburgh Railways Co.*, 216 Pa. 590; *Wolf v. P. R. T. Co.*, 252 Pa. 448; *Moss v. Philadelphia Traction Co.*, 180 Pa. 389.

Francis A. Wolf, with him *Francis B. Cohan*, for appellee.—Reciprocal rights and duties are imposed upon pedestrians and drivers of vehicles in a public highway. Each must exercise reasonable and ordinary care: *Schmidt v. McGill*, 120 Pa. 405.

There was no such positive evidence tending to show negligence on the part of the plaintiff as would have justified the trial court in holding that as a matter of law plaintiff was guilty of contributory negligence: *McGovern v. Union Traction Co.*, 192 Pa. 344.

Where it is not clearly and plainly evidenced that plaintiff could have seen the danger, the question of his contributory negligence is for the jury: *Miller v. Tiedemann*, 249 Pa. 234; *Kurtz v. Tourison*, 241 Pa. 425; *Lorah v. Rinehart*, 243 Pa. 231; *Bodge v. Philadelphia*, 167 Pa. 492; *Christian v. Commercial Ice Co.*, 3 Pa. Superior Ct. 320; *Streitfeld v. Shoemaker*, 185 Pa. 265; *McGovern v. Union Traction Co.*, 192 Pa. 344.

The fact that plaintiff crossed the street in front of a standing street car does not convict him of contributory negligence as a matter of law: *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354.

Plaintiff was not bound to anticipate defendant's negligence: *Lewis v. Wood*, 247 Pa. 545; *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354.

The cases cited in appellant's argument, especially to show contributory negligence on the part of the plaintiff, are distinguishable on the ground that they dealt

with pedestrians being hit by street cars running at right angles to the paths pedestrians were traversing and with no obstacles in the way to obstruct the pedestrians' view.

PER CURIAM, January 7, 1918:

The judgment is affirmed on the opinion of the learned court below overruling the motions for a new trial and judgment for the defendant non obstante veredicto.

Montgomery's Estate.

Statute of limitations—Bar of claim—Tolling of statute—Subsequent promise to pay—Evidence—Insufficiency—Indebtedness on several obligations—Payment—Application to barred claim without debtor's consent.

1. To remove the bar of the statute of limitations, the promise to pay must refer distinctly and specifically to the original debt.

2. Where a person is indebted to another on several distinct obligations, one of which is barred by the statute of limitations, and thereafter the debtor makes a payment, the application of the whole or a part of such payment to the barred claim, without the knowledge or consent of the debtor, cannot operate to toll the statute as to such claim.

3. A claim against a decedent's estate was properly disallowed where it was based on an oral promise by decedent in 1904, since which time a greater period than the statutory limitation of six years had elapsed without decedent having renewed his promise to pay, or having paid any interest thereon, and, although it was contended that decedent had made a payment on account after the claim had been barred, it appeared that decedent was indebted to claimant on several other obligations, not barred by the statute, and made a payment to claimant, part of which claimant applied to the barred claim without the knowledge or consent of deceased.

Argued Oct. 12, 1917. Appeal, No. 133, Oct. T., 1917, by Robert Thompson, from decree of O. C. Allegheny Co., Feb. T., 1917, No. 100, dismissing exceptions to adjudication in Estate of Samuel Montgomery, Deceased. Be-

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fore MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Exceptions to report of auditing judge.

The facts appear from the following opinion by MILLER, J.:

Two claims are presented by Robert Thompson; one a note of \$3,000.00 dated October 1, 1903, on which there is a credit allowed of \$1,000.00, leaving a balance due with interest of \$2,169.00; the other, a general claim not evidenced by any writing, in the sum of \$5,896.00, with interest from January 1, 1904, on which two credits have been recently allowed; the two claims thus presented are with interest in the sum of \$11,066.86.

In addition, although not presented for payment, it appears that the claimant holds two notes of the decedent, one in the sum of a thousand dollars, dated June 18, 1902, and the other in the sum of five hundred dollars, dated October 16, 1905. They are not presented, it being stated that they had been adjusted by various credits; they were explained at the audit, but still seem to be in the possession of the claimant.

There was also a second note of the three parties to the Oakland Trust Company of \$3,000.00, made February 1, 1913, which later Moore and Montgomery carried, paying Thompson's share thereon; on settlement Thompson owed to Montgomery \$629.37 for this transaction, which he credited on the large claim after Montgomery's death.

It is conceded that the \$3,000.00 note of October 1, 1903, by reason of the proof of the payment of interest thereon before decedent's death and certain other acknowledgments in connection therewith, is a valid subsisting claim.

The claim in the sum of \$5,896 presents serious difficulties. The history of this claim, as testified to by Mr. Moore, in substance, is as follows:

Some time previous to 1904 Montgomery, Thompson

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and Moore, with others, were interested in a gold mining proposition; Moore and Montgomery each had the same interest therein and each borrowed from Thompson three thousand dollars to pay for their respective original investments; as an evidence of this the note from Montgomery to Thompson was given.

Evidently, the gold mining venture was not a success, and in the fall of 1903 a reorganization was effected including the three parties named and other stockholders who got stock of the new company to the amount represented by their original investments. This reorganization involved the payment of the debts by the stockholders who continued. Thompson paid the shares of Moore and Montgomery, and in the fall of 1903 it was agreed between them that Moore and Montgomery each owed Thompson \$5,896.00 for their shares of the debts that he had paid for them. Montgomery seemed to have been the secretary or party who kept record of the calculations in arriving at the foregoing amounts and to have thereafter continued in that capacity, but no written evidences are found among his papers. Moore recognized, and still recognizes, his individual debt in the foregoing amount to Thompson, and has been reducing it. What the amount may be that he still owes, is not before this court, nor is it material. He says that his understanding is that Montgomery continued to recognize the debt; that he and Thompson had other transactions which were adjusted in his, Moore's, office, and that various checks and receipts passed between them; he says that shortly before Montgomery died he stated that he would like to sell some real estate and settle with Thompson; but he is not able to state, nor does it appear in evidence, that the settlement he contemplated was on the other transactions between them or on the three thousand dollar note, which he then still clearly owed to Thompson, or to the adjustment of the other note in the same amount that the parties had carried between themselves in the Oakland Savings & Trust Company, or

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whether the settlement included, and was intended to be, a recognition of the open, general claim of \$5,896.00.

It appears that in October, 1915, Montgomery, the decedent, gave Thompson a check for two thousand dollars; neither the check nor the stub showed for what it was given; Thompson has given credit for one-half of this payment on account of said note, crediting the balance on his general claim of \$5,896.00; there is no evidence that he told Montgomery how he would apply this credit or that Montgomery gave the check or any part thereof in recognition of the other debt, or knew that it was so applied; so far as the evidence indicates it was the self-serving voluntary application by the creditor of this check upon what he held to be two obligations to be due to him from Thompson.

After Montgomery's death, as stated before, the administrator and Moore paid the balance of the Oakland Trust Company note; of the whole payment to the extent of \$629.37, Thompson on May 5, 1916, allowed as a credit toward his claim of \$5,896.00. There is no evidence of any agreement between the administrator or Thompson as to what indebtedness was to be credited with this amount.

Evidently no interest was ever paid on the alleged indebtedness of \$5,896.00, for Thompson claims interest on the full amount from 1904.

All the other indebtedness involving business transactions between Thompson and Montgomery whereby Montgomery was indebted to Thompson are evidenced by notes. The large claim in question depends wholly upon the alleged adjustment between the parties fixing a debt in 1904, and Mr. Moore's testimony is that these parties met continuously, discussed their mining transactions and other transactions, adjusted differences between themselves, and while he says Montgomery paid interest on this claim, it appears, if it was paid, that Thompson allows no credit therefor, and thus repudiates the payment of interest thereon.

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The defense to the claim is, first, lack of sufficient evidence to establish it clearly, and, second, the bar of the statute, even if it did exist in 1904. As indicated before, the evidence is sufficient to establish the fact of a recognized indebtedness by Montgomery to Thompson in January, 1904, or the latter part of December, 1903, of \$5,896.00. From that time on, there is no clear proof of the recognition of this particular claim by Montgomery, of his promise to pay it, or any interest paid thereon, or any credits allowed for a period far exceeding the statutory limitation of six years, other than the voluntary credit made by Thompson in 1915, and this without any evidence of notice to, or agreement by, Montgomery that it should be applied as a credit on the original debt and involving an acknowledgment of the debt. There is no evidence of a direct, clear and unequivocal promise, express or implied, from Montgomery to Thompson, or to Thompson's duly accredited agent, of his liability for or indebtedness to, Thompson, coupled with a promise to pay made at any time. The fact that Moore recognized his original indebtedness to Thompson and acknowledges he still owes Thompson on account thereof, and that he believes that Montgomery is indebted to Thompson on a like claim, is not sufficient to bring this testimony within the strict standard of testimony which must be clearly established to avoid the bar of the statute. In view of the fact that Moore testifies that these men had many other dealings, some of which have been brought into this case, and others of an outside character, involving monetary transactions between them, the evidence is of a very doubtful character upon which to find as a fact that these transactions were in connection with, an acknowledgment of, and promise to pay, this distinct old debt dating from 1904.

On the whole, the evidence offered in support of this particular claim is too vague and indefinite to establish

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the fact of a recognition and promise to pay this debt by the decedent to the claimant or to his agent.

Granted that a creditor has the right to appropriate payments made by his debtor as he sees fit in the absence of a stipulation by his debtor as to which of several debts, or to what amount, credits shall be allowed: *Chestnut St. Trust & Saving Fund Co. v. Hart*, 217 Pa. 506; even to a debt barred by the statute of limitations: *Ramsey v. Warner*, 97 Mass. 8, p. 13, where it is said: "If the creditor makes the appropriation, he may do it to a debt barred by the statute of limitations; but such an appropriation will not have the effect to take the debt out of the operation of the statute. It seems to be regarded as a mere permission of law to the creditor thus to apply it, and not an intentional payment on that account, which is necessary to involve the admission of the whole debt, and the implied renewal of the promise to pay it. The debtor is not presumed to have intended to renew a promise which is no longer legally binding upon him, although he has put it in his creditor's power to satisfy pro tanto a claim upon which he had lost his legal remedy."

To remove the bar of the statute, the promise must refer distinctly and specifically to the original debt: *Burr v. Burr*, 26 Pa. 284; it must be unequivocal and absolute, made to the owner or in his behalf: *Hostetter v. Hollinger*, 117 Pa. 606. Declarations of a debtor to strangers to the transaction that he had acknowledged the indebtedness to his creditor and promised him to pay it, will not bar the statute: *Spangler v. Spangler*, 122 Pa. 358; the promise to pay must not be vague, shadowy or uncertain; it must be express and unambiguous: *Kensington Bank v. Patton*, 14 Pa. 479. The decisions of the Supreme Court apply very strict rules to acknowledgments to take a case out of the statute of limitations and are adhered to in letter and spirit: *Schaeffer v. Hoffman*, 113 Pa. 1. Here, as in *Shaffer's Est.*, 228 Pa. 36, a mere general statement by the debtor

Opinion of Court below—Opinion of the Court. [259 Pa. that he will settle, without more, is not an acknowledgment of a debt and a promise to pay. Here, as there, Thompson had abundant opportunity to enforce his demand against Montgomery, who evidently had become a man of means, with whom he was in constant communication and had many business transactions, and from whom he took an acknowledgment in writing of a debt in every other case. It was easy, prudent and vitally essential that the claimant in this case should have better evidences of the alleged indebtedness which he should have acquired with diligence while the alleged debtor was living, and not wait until his lips are sealed in death.

This claim must be disallowed for want of the clear, explicit and unambiguous testimony indicating an acknowledgment of, and promise to pay, this particular debt. The credits allowed without authority on the claim in 1915 and since the death of Montgomery in 1916 in the absence of an agreement that it should be applied thereto, are not sufficient to toll the statute.

The three thousand dollar note, to the extent of two thousand dollars and interest, is allowed.

The lower court dismissed the exceptions to the adjudication. Robert Thompson appealed.

Error assigned, among others, was the decree of the court.

Thomas S. Brown, of *Brown, Stewart & Bostwick*, for appellant.

Joseph N. Houston, with him *Edward C. Chalfant*, for appellee.

PER CURIAM, January 7, 1918:

The decree of the court below is affirmed on the opinion of the learned auditing judge.

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Syllabus—Arguments.

Campbell v. Vincent et al., Appellants.

Negligence—Defective sidewalk — Flagstone — Roots of trees—Liability of property owner—Case for jury.

In an action by a pedestrian to recover for personal injuries resulting from a defect in a sidewalk causing her to trip and fall, the case is for the jury and a verdict and judgment for the plaintiff will be sustained where it appeared that at the point of the accident the outer edge of the flagstone pavement had been raised to a height of from four to six inches at the surface by the growth of the roots of a tree; that at the time of the accident it was almost dark, snow was falling and nearly two inches of snow covered the ground; that plaintiff was looking in front of her for a distance of from four to six feet and did not see the defect in the sidewalk until she had fallen, and while still on the ground discovered the cause of her accident.

Argued Oct. 15, 1917. Appeal, No. 137, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., April T., 1915, No. 1561, on verdict for plaintiff in case of Araminta M. Campbell v. Fannie B. Vincent, Samuel O. McLean, Frank McLean, Ida J. Haymaker, Clyde J. McLean and Minnie M. Kammerer impleaded with Sarah B. Patterson. Before BROWN, C. J., POTTER, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Trespass for personal injuries. Before EVANS, J.

The facts appear by the opinion of the Supreme Court.

Verdict for plaintiff for \$2,500 and judgment thereon. Defendants appealed.

Error assigned, among others, was in refusing defendants' motion for judgment non obstante veredicto.

George C. Bradshaw, with him *M. L. Thompson* and *L. B. D. Reese*, for appellants.—Plaintiff was guilty of contributory negligence as a matter of law: *Kennedy v. Pittsburgh*, 230 Pa. 244; *Kennedy v. Philadelphia*, 220 Pa. 273; *Sickles v. Philadelphia*, 209 Pa. 114; *Shall-*

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cross v. City of Philadelphia, 187 Pa. 143; Lerner v.
City of Philadelphia, 221 Pa. 294.

Meredith R. Marshall, with him *Rody P. Marshall*, for appellees, cited: *Llewellyn v. Wilkes-Barre*, 254 Pa. 196; *Levine v. City of Pittsburgh*, 252 Pa. 181; *Kellow v. City of Scranton*, 195 Pa. 134; *Allegheny v. Gilliam*, 30 P. L. J. 461.

OPINION BY MR. JUSTICE FRAZER, January 7, 1918:

Plaintiff sued defendants, property owners on South avenue in the Borough of Wilkesburg, to recover damages for personal injuries sustained by reason of a defect in the sidewalk in front of defendants' premises. The case was submitted to the jury in a fair and adequate charge, of which no complaint is made, and a verdict rendered for plaintiff. Defendants appealed. The single question raised is whether the court erred in not holding, as matter of law, that plaintiff was guilty of contributory negligence.

In front of defendants' property between the paved portion of the sidewalk and the curb stands a shade tree, the roots of which had by gradual growth raised the outer edge of the flagstone pavement to a height of from four to six inches above the surface, causing the flagstone to break near the middle of the pavement and produce a depression due to the elevation of the outer edge of the stone. On the evening of March 2, 1914, between 5 and 5:30 o'clock, plaintiff, in passing along the sidewalk at this point, struck her foot against the raised end of the flagstone, so that she tripped and fell, with the result that she sustained the injuries for which this action was brought to recover compensation. At the time of the accident "it was almost dark," snow was falling and nearly two inches of newly fallen snow covered the ground. Plaintiff testified she was looking in front of her for a distance of from four to six feet, walking with ordinary care and did not see the defect in the

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sidewalk until she had fallen, and, while still on the ground, discovered the cause of her accident.

In view of this testimony plaintiff fully met the burden resting upon her to show conditions outside of herself which prevented her from noticing the defect, or excused her failure to observe it, within the rule laid down in *Lerner v. Philadelphia*, 221 Pa. 294; the question of her contributory negligence consequently was for the jury.

The uncertain light, the falling snow, and the snow at the time covering the ground, all tended to serve as a reasonable excuse for plaintiff's failure to observe the condition of the walk, and whether she was exercising such care and caution as the law requires of her was for the jury: *Bruch v. Philadelphia*, 181 Pa. 588; *Llewellyn v. Wilkes-Barre*, 254 Pa. 196.

The judgment is affirmed.

Swartz v. Bergendahl-Knight Company, Appellant.

Negligence—Master and servant—Defective scaffold—Fall of workman—Safe place to work—Employer's duty to inspect and repair—Delegation of duty—Foreman—Vice-principal—Obvious danger—Assumption of risk—Contributory negligence—Case for jury.

1. A scaffold is a place to work and in the erection thereof the employer is providing a place to work, and if, through failure of duty to make it reasonably safe, an injury results to another, he is responsible.

2. It is the duty of the employer not only to furnish safe timbers for a scaffold and to have it properly constructed, but also to maintain it in reasonably safe condition by inspection and repair.

3. An employee must know the circumstances and appreciate the risk before he will be held to have assumed it. He is not equally bound with his employer to know whether appliances are reasonably safe and in ordinary use and does not assume the risk upon the employer's failure to provide such as are proper.

4. In an action against a construction company to recover for

the death of plaintiff's husband occasioned by the breaking of a scaffold upon which he was working while in defendant's employ, the case was for the jury and a verdict and judgment for plaintiff will be sustained where it appeared that the scaffold had been erected by other men in defendant's employ about two or three weeks prior to the accident, which occurred on the first day deceased worked on the building and about an hour after he began work; that the timber used in the broken beam was defective in not being sufficiently large for the purpose of carrying the weight for which it was intended, that it contained wind-shakes or cracks and numerous knots, many of which extended entirely through the timber and could be seen externally before and after the accident, and that they weakened the beam and thereby diminished its carrying capacity; and that no inspection of the scaffold had been made subsequent to its construction and prior to the accident by which the defects could and should have been discovered and remedied.

5. In such case the duty to provide a safe place to work was a nondelegable duty and there is no merit in defendant's contention that although the foreman who made the selection of the timber was a vice-principal there was no evidence of his incompetency and his mistake therefore did not amount to negligence.

Argued Oct. 10, 1917. Appeal, No. 100, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1915, No. 62, on verdict for plaintiff in case of Ella J. Swartz v. Bergendahl-Knight Company, an Illinois corporation. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Trespass for personal injuries. Before CARNAHAN, J.

Verdict for plaintiff for \$5,400 and judgment thereon. Defendant appealed.

Error assigned, among others, was in refusing defendant's motion for judgment non obstante veredicto.

William S. Dalzell, of Dalzell, Fisher & Hawkins, for appellant.—If there were defects in the beam they were apparent to deceased, and he therefore assumed the risk: Brosman v. Lehigh Valley R. R. Co., 113 Pa. 490; Bem-

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isch v. Roberts, 143 Pa. 1; Cunningham v. Fort Pitt Bridge Company, 197 Pa. 625.

In order that an employer could be held liable to an employee for negligence arising from some defect in the machinery or appliances at the time of the accident, it is not enough to show that the defect existed at the moment of the accident: Mixer v. Imperial Coal Company, 152 Pa. 395; Baker v. Allegheny Valley R. R. Co., 95 Pa. 211; Sandt v. North Wales Foundry Company, 214 Pa. 215.

The danger resulting in the injury to the plaintiff was transitory and due to deterioration in the condition of the beam during the progress of the work, and it is not the duty of the master in such case to follow up the servant every moment to see that the implement with which he is working is safe: Coleman v. Keenan, 223 Pa. 29; Wilson v. Brown, 222 Pa. 364; Miller v. American Bridge Company, 216 Pa. 559; Iams v. Hazel-Atlas Glass Company, 251 Pa. 439.

A. C. Stein, with him *A. C. Teplitz* and *Fred E. Geiser*, for appellees.—It was the duty of the foreman to inspect the beams from time to time: Barry v. Jones & Laughlin Steel Co., 234 Pa. 367; O'Donnell v. The Bell Telephone Co. of Penna., 250 Pa. 440; Wilkinson v. Evans, 34 Pa. Superior Ct. 473; Bondo v. American Iron & Steel Mfg. Co., 66 Pa. Superior Ct. 479.

Even though the danger may have been apparent to defendant's employees constructing the scaffold, such fact could not relieve the employer of liability, where deceased did not enter its employ until after the construction of the scaffold: Whitely v. Evans, 30 Pa. Superior Ct. 41; Kaiser v. Flaccus, 138 Pa. 332; Wallace v. Henderson, 211 Pa. 142; Bondo v. American Iron & Steel Mfg. Co., 66 Pa. Superior Ct. 479.

Defendant is liable for its foreman's negligence in designating the defective beam in question for use in the scaffold: Danner v. Wells, 248 Pa. 105; Groves v. Mc-

Neil, 226 Pa. 345; Studebaker v. Shelby Steel Tube Co., 226 Pa. 239; Carr v. General Fire Extinguisher Co., 224 Pa. 346; Mayers v. The Atlantic Refining Co., 254 Pa. 544; Klenzing v. Greenfield Lumber Co., 255 Pa. 516.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

This is an action of trespass brought by Ella K. Swartz to recover damages for the death of her husband who was killed by the breaking of a scaffold upon which he was working while in the employ of the defendant company.

The plaintiff's husband was a structural steel worker and riveter, and, on March 16, 1915, while he was engaged in assisting in the erection of the structural iron and steel frame of the William Penn Hotel in the City of Pittsburgh, one of the two needle beams in the scaffolding on which he and other employees were working broke, causing the plank resting on the beams to fall, and throwing the deceased through an open space directly beneath the scaffold a distance of about eighty feet to the street floor, as a result of which he died. The scaffold was constructed by laying planks across parallel timbers about seven feet apart, known as needle beams, which were suspended by ropes from the steel girders immediately above. The negligence alleged was the failure to furnish the deceased a reasonably safe place whereon to work, negligent and improper construction of the scaffold by using therein a defective needle beam, failure to properly inspect the beam, failure to provide and furnish suitable beams for the construction of the scaffold, and, in violation of the laws of Pennsylvania, failure to have the joists or girders on the fourth and fifth floors, beneath the place where the deceased was working, covered with rough boards or other suitable material so as to protect the workmen on the scaffold from falling through said joists or girders. The plea was not guilty. The trial resulted in a verdict for the plaintiff. The defendant offered no evidence, but requested the court to give binding instructions for the de-

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fendant, which was refused. The errors assigned are the refusal to give such instructions and in overruling the defendant's motion for judgment non obstante veredicto.

The only question involved in this appeal, therefore, is whether there was sufficient evidence of negligence to justify the court in submitting the case to the jury. It is contended by the defendant that there was no evidence of any defect in the scaffold at the time of the accident; that, if there was a defect, it was open and obvious and one which the deceased was bound to take notice of; and that as the evidence shows there was no standard for selecting the materials for constructing the scaffold, and such selection was dependent upon the good judgment of the foreman, "who was when making the selection a vice-principal," and, there being no evidence of incompetency of the foreman, his mistake, if any there was, did not amount to negligence for which the employer was liable.

We have carefully examined all the testimony and are of the opinion that the learned judge was right in holding the evidence sufficient to warrant its submission to the jury on the question of defendant's negligence. We think it not necessary to give an excerpt of the testimony, or to state in detail what each witness testified. The only evidence in the case is that introduced by the plaintiff. Swartz was a riveter, and was engaged in that work at the time of the accident. The scaffold was erected by other men in the riveting gang about two or three weeks before the accident which occurred on the first day Swartz worked on the building and an hour or so after he began work. The needle beams were some eighteen feet in length. The broken beam was in evidence and inspected by the jury. These beams were three and one-half by five inches, and expert witnesses testified that they should have been four by six inches, or larger. A witness testified that the wood in the broken beam was brash or brittle and too

light for the use, and practically worthless for a needle beam. As a reason for his opinion, he said that the timber was not the right size nor the right grade. It appeared from other testimony that the timber used in the broken needle beam showed a number of wind-shakes which would be perfectly evident before as well as after the beam broke and regardless of whether the beam had been painted or not. Wind-shakes are cracks in the timber that are due to the wind while the timber stands or to drying in the center after the timber is cut. There were five visible wind-shakes on one side of the broken beam, not including those on the top or bottom. Wind-shakes split the beam and prevent it from acting as a whole. They split the interior section of the beam and reduce its strength as a carrying timber. There were a great number of knots in the side of the beam which were very pronounced and which impaired its strength. Some of the knots extended entirely through the beam, and it broke at this point. It, therefore, appears from the testimony that the timber used in the broken beam was defective in not being sufficiently large for the purpose of carrying the weight for which it was intended, that it contained wind-shakes or cracks and numerous knots, many of which extended entirely through the timber and could be seen externally before and after the accident, and that they weakened the beam and thereby diminished its carrying capacity. It was further shown that no inspection of the scaffold had been made subsequent to its construction and prior to the accident, by which the defects, disclosed by the evidence, could and should have been discovered and remedied. By their verdict, and there was sufficient evidence to support it, the jury found that the needle beam was defective and from external appearances the defects could and should have been discovered at the time the beam was selected for the scaffold, and also thereafter by proper inspection. It is the duty of the employer not only to furnish safe timbers for the scaffold and to have it properly con-

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structed, but also to maintain it in a reasonably safe condition by inspection and repair: *Finnerty v. Burnham*, 205 Pa. 305; *Barry v. Jones & Laughlin Steel Co.*, 234 Pa. 367.

There is no ground for the contention that the defects were obvious to the deceased before the accident. The evidence showed the scaffold had been erected two or three weeks before he saw and went upon it on the morning he received his injuries, and he had been working there only about an hour before the beam broke and precipitated the workmen to the ground below. It was his first day on the job. The needle beams were necessarily covered by the planks laid upon them, and any defects in them would be hidden from his view. The testimony, therefore, did not disclose negligence or assumption of risk on the part of the deceased. An employee must know the circumstances and appreciate the risk before he will be held to have assumed it: *Schall v. Cole*, 107 Pa. 1. He is not equally bound with his employer to know whether appliances are reasonably safe and in ordinary use, and he does not assume the risk upon the employer's failure to provide such as are proper: *Bannon v. Lutz*, 158 Pa. 166. It may be suggested, however, that whether the danger was obvious and should have been seen and recognized by the deceased was for the jury and not for the court.

The appellant admits that the foreman was a vice-principal when making the selection of the timber for the scaffold, but claims that, as there was no evidence of his incompetency, his mistake did not amount to negligence. It appears from the evidence and the jury were justified in finding that there was not an ample supply of materials for the construction of this scaffold and also that defendant's foreman selected the particular beams and boards which the employees were to use in the scaffold and that there were no other beams available for use in its construction. The act of the foreman, therefore, in designating the material to be used in this particular

scaffold, was the act of his employer. It was unquestionably the duty of the defendant to furnish the deceased with a reasonably safe place to work, and it was immaterial whether that duty was performed by the company's general superintendent or an ordinary employee, as either would be performing a nondelegable duty imposed upon the employer. He would be a vice-principal for whose act, resulting in an injury to another, his employer was responsible. A scaffold is a place to work, and in the erection of that scaffold the employer is providing a place to work, and, if through failure of duty to make it reasonably safe an injury results to another, he is responsible. It is immaterial whether the scaffold is insufficient and defective by reason of the use of faulty and unsuitable material or in its construction, the responsibility rests upon the employer. He fails to perform a duty which the law imposes upon him, and, hence, his liability results for the injurious consequences. There are numerous decisions in this state sustaining these legal conclusions on facts similar to those present in this case. We may cite the following: *Geist v. Rapp*, 206 Pa. 411; *Carr v. General Fire Extinguisher Co.*, 224 Pa. 346; *Studebaker v. Shelby Steel Tube Co.*, 226 Pa. 239; *Groves v. McNeil*, 226 Pa. 345; *Danner v. Wells*, 248 Pa. 105; *Garrison v. Armstrong & Co.*, 248 Pa. 402; *Mayers v. Atlantic Refining Co.*, 254 Pa. 544. The facts of this case clearly distinguish it from the cases cited and relied on by appellant where the workmen themselves selected the timber and erected the scaffold from an ample supply of proper materials furnished by the employer. Here, as already observed, the foreman, acting for the employer, selected the defective beam and planks to be used in the scaffold, from the only timber available for the purpose.

The judgment is affirmed.

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Syllabus.

Edmundson's Estate.

Contracts—Contracts for benefit of third person—Beneficiary's right to sue—Evidence—Deeds—Consideration—Parol evidence of different consideration—Witnesses—Competency—Testimony of surviving party—Act of May 23, 1887, P. L. 158, Sec. 5, Clause e.

1. To the rule that at common law no one could maintain an action upon a contract to which he was not a party, there are exceptions where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, and where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts and pay the debts of his vendor.

2. Parol evidence is competent for the purpose of showing that the consideration for the conveyance of real estate is other than that expressed in the deed.

3. To disqualify a surviving party to a contract from testifying, he must not only be a surviving and remaining party but must have an interest adverse to the right of the deceased party, under the Act of May 23, 1887, P. L. 158, Section 5, Clause e. It is the adverse interest, not the adverse testimony, that disqualifies a witness.

4. Where a person conveys real estate, on the grantee's express oral promise to pay, to a third person, the amount received from the subsequent sale of the property, and thereafter the grantee dies without having fulfilled the promise, the grantor is a competent witness to testify in behalf of the beneficiary's claim against the grantee's estate.

5. A claimant against a decedent's estate presented evidence that a conveyance of an interest in certain real estate had been made by claimant's mother to decedent in her lifetime on decedent's oral promise that in case she should sell it during her lifetime she would pay the claimant the full amount invested therein by plaintiff's father, and if she did not sell same would bequeath said amount to claimant. The deed recited a valuable consideration, but there was evidence that no actual consideration had been paid. Decedent did not sell the real estate and at her death bequeathed \$1,000 to claimant. Claimant's mother testified as to such oral contract, although the existence thereof was denied by decedent's children, who claimed that at the time of the delivery of the deed there was a default in payment of the money due on a mortgage and that the property was conveyed to prevent foreclosure proceedings. The

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auditing judge allowed the claim less the amount of the legacy of \$1,000. *Held*, (1) claimant was entitled to recover on the contract, being the only person beneficially interested in the payment of the money, (2) claimant's mother was a competent witness to prove the oral contract as she was not an adverse party, and (3) there was sufficient evidence to sustain the finding of the auditing judge in claimant's favor and the finding will be sustained.

Hoffa v. Hoffa, 38 Pa. Superior Ct. 356, approved.

Practice, Supreme Court—Appeals—Auditing judge—Findings of fact—Conclusiveness.

6. In the absence of a clear and manifest error the findings of fact of an auditing judge on conflicting evidence will be sustained.

Argued Oct. 11, 1917. Appeal, No. 119, Oct. T., 1917, by E. R. Edmundson and Ira H. Edmundson, from decree of O. C. Allegheny Co., March T., 1917, No. 53, dismissing exceptions to adjudication in Estate of Phebe Edmundson, deceased. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and WALLING, JJ. Affirmed.

Exceptions to adjudication. Before TRIMBLE, J.

The facts appear by the opinion of the Supreme Court.

The court in banc entered a decree sustaining the findings of the auditing judge. E. R. Edmundson and Ira H. Edmundson appealed.

Error assigned, among others, was the decree of the court.

E. R. Edmundson, with him *Owen S. Cecil*, for appellant.—The facts of the case at bar do not bring it within the exceptions to the rule that no one can recover on a contract to which he is not a party, since the money to be paid was not to be derived from or out of the property conveyed, the deed acknowledging full consideration for the conveyance: *Hawn v. Stoler*, 208 Pa. 610; *Fross's App.*, 105 Pa. 258; *Walsh's App.*, 122 Pa. 177.

Claimant's mother, a surviving party to the contract,

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was not a competent witness: Act of May 23, 1887, P. L. 158, Sec. 5, Clause e.

The evidence was insufficient to support claimant's claim: *Bergner v. Bergner*, 219 Pa. 113; *Worrall's App.*, 110 Pa. 349; *Walker v. Walker*, 254 Pa. 320; *Oliver v. Oliver*, 251 Pa. 574.

John E. Winner, with him *John D. Brown*, for appellee.—Where money or property is placed by one in the hands or possession of another to be paid or delivered to a third person, an equitable title to the money or thing which is the consideration of the promise passes to the beneficiary and he may release or compel performance in his own name: *Adams v. Kuehn*, 119 Pa. 76; *Hoffa v. Hoffa*, 38 Pa. Superior Ct. 356; *Delp v. Brewing Company*, 123 Pa. 42; *First M. E. Church v. Isenberg*, 246 Pa. 221; *Sweeney v. Houston*, 243 Pa. 542; *Howes v. Scott*, 224 Pa. 7; *Hostetter v. Hollinger*, 117 Pa. 606; *Sargeant v. Nat'l Life Insurance Co. of Vermont*, 189 Pa. 341; *Norristown Trust Co. v. Lentz*, 30 Pa. Superior Ct. 408; *Lancaster County Nat'l Bank v. Henning*, 171 Pa. 399.

It is the adverse interest of a surviving party to a contract and not his adverse testimony that disqualifies him: *First National Bank of Bloomsburg v. Gerli*, 225 Pa. 256; *Joseph Horne & Co. v. Petty*, 192 Pa. 32; *Dickson v. McGraw Bros.*, 151 Pa. 98; *Allen's Est.*, 207 Pa. 325.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

This is an appeal from the decree of distribution made by the Orphans' Court of Allegheny County, allowing a claim against the estate of Mrs. Phebe Edmundson, deceased. In 1892 J. A. Herron purchased a house and lot in the City of Pittsburgh for the consideration of five thousand five hundred dollars, and, at his suggestion, the title to the property was taken in the name of his wife, Carrie E. Herron, who was a daughter of Mrs. Edmundson, the decedent. Three thousand six hundred

dollars of the purchase-money was borrowed on a building and loan association mortgage for that amount on which payments of principal and interest were made at various times by Mr. Herron until July, 1894. In that year Mr. and Mrs. Herron were divorced, and in the autumn of 1895 Mrs. Herron was married to Joseph Stadtfeld. By a deed, dated November 16, 1895, Mr. and Mrs. Stadtfeld conveyed the house and lot in question to Mrs. Edmundson, the consideration stated being \$5,500, subject to liens and encumbrances.

At the audit of the account filed by the executor of Mrs. Edmundson, Carrie Herron, now Mrs. Carrie Cotton, daughter of Mrs. Carrie E. Herron, presented for allowance a claim for \$3,333.01 alleged to be due her on an oral contract made by the decedent in 1895 with Mrs. Carrie E. Herron, the mother of the claimant. It is alleged that in the autumn of 1895 Mrs. Edmundson agreed to take title to the property in question under an express agreement made with Mrs. Herron that Carrie Herron, then her infant daughter, should receive all that the latter's father, J. A. Herron, had put into the property in case of a sale by Mrs. Edmundson during her lifetime, or if the property was not sold by Mrs. Edmundson she would leave to Carrie Herron the full amount invested therein by Mr. Herron at her death. With this understanding and agreement, it is claimed that Mrs. Stadtfeld and her husband executed and delivered the deed for the property, subject to the unpaid balance of the mortgage, to Mrs. Edmundson. While this deed recites a consideration of \$5,500, it is contended, and the evidence shows, that Mrs. Edmundson paid nothing to the grantors or to Mr. Herron for the property. Mrs. Edmundson did not sell the real estate, and at her death bequeathed \$1,000 to Mrs. Cotton.

The children of Mrs. Edmundson deny that she ever entered into a contract to pay or give Mrs. Cotton any sum whatever during her life or at her death, or that she ever made any arrangement or agreement with the

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Stadtfelds as to the disposition of the property or its proceeds. On the contrary, they claim that at the time of the execution and delivery of the deed there was a default in payment of the money due on the mortgage, and the property was conveyed to Mrs. Edmundson by the grantors to prevent foreclosure proceedings.

The claim was allowed by the auditing judge, less the amount of the legacy of \$1,000 to Mrs. Cotton. Exceptions filed by parties interested under Mrs. Edmundson's will were dismissed, and exceptants have appealed assigning as error the overruling of the exceptions, the decree of distribution and the allowance of the claim, and the admission of the testimony of Mrs. Stadtfeld.

The questions raised by the assignments of error are:

(a) The right of the claimant to recover on the contract, she not being a party thereto or to the consideration, and having no beneficial interest in the property transferred; (b) the competency of the mother of the claimant as a witness to prove the oral contract; and (c) the sufficiency of the evidence to sustain the claim.

We think Carrie Herron, now Mrs. Cotton, can enforce, by an action or proceeding instituted in her own name, the contract made by her mother with the decedent for the benefit of the claimant. In *Howes v. Scott*, 224 Pa. 7, 10, it is said: "At common law no one could maintain an action upon a contract to which he was not a party. This rule is well established in this country, and it is recognized by both state and federal courts. There are, however, exceptions to the rule which, in this State, are as well settled as the rule itself. For nearly three-quarters of a century, since the decision in *Blymire v. Boistle*, 6 Watts 182, the decisions of this court have uniformly recognized and enforced the exceptions whenever the facts of a case required it." In *Adams v. Kuehn*, 119 Pa. 76, 85, Mr. Justice WILLIAMS, delivering the opinion, says: "Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested

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in the payment or the delivery, he can release the promisor from performance or compel performance by suit." He then notes some of the exceptions to the general rule at common law that a person could not maintain an action upon a contract to which he was not a party, as follows: "Among the exceptions, are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to, and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone."

Mrs. Edmundson took title to the land, as the court found, under an oral agreement to give Mrs. Cotton, the claimant, the amount of money invested in the land by the claimant's father when the premises might be sold or at the grantee's death. The premises were not sold by the grantee, nor did she make provision by her will for payment of this claim. It is clear, therefore, that she failed to comply with the contract on her part. The claimant was not a party to the contract, and had no

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beneficial interest in the property conveyed by her mother to the decedent, but she is the only party beneficially interested in enforcing the claim secured by it. Mrs. Herron, the grantor, has no interest in the claim. The deed is absolute and conveys the property to the decedent without any conditions imposed for the payment of any sum whatever to her. The promise contained in the agreement was not in consideration of the payment of an existing indebtedness due Mrs. Herron, the promisee, and, therefore, could not be released or enforced by her. This proceeding is on the oral contract to compel payment to the party beneficially interested by its terms, and not to enforce any covenant or condition in the deed in favor of the grantors or promisees therein. Being the only person beneficially interested in the payment of the money secured thereby, the claimant can release the promisor's estate from performance, or compel performance of the terms of the contract by suit. While the deed showed the payment of a consideration of \$5,500, there was, in fact, nothing whatever paid or agreed to be paid by the decedent to the grantors for the transfer of the property. This was shown by parol evidence which was competent for the purpose: *Sargeant v. Nat'l Life Insurance Co. of Vermont*, 189 Pa. 341, 346. We think the facts of this case bring it within the doctrine of our decisions, and that the claimant can recover in an action or proceeding instituted by her against the estate of the decedent.

In *Hoffa v. Hoffa*, 38 Pa. Superior Ct. 356, the learned Superior Court applied the same doctrine and held that the person beneficially interested could maintain an action on the contract. There, one brother conveyed a farm to another for the consideration of \$1 named in the deed, and the grantee agreed to pay another brother and sister \$1,000 each. The farm was in fact worth \$3,000. It was held that the brother and sister could maintain a suit against the grantee's administrator for the money which the grantee had promised his brother to pay them,

and that the declarations of the grantee were admissible in evidence and constituted sufficient proof of the contract. The learned counsel for the appellants concede that the present case seems to be on all fours with the Hoffa case, but claim that the latter case is distinguished by the fact that the deed showed a nominal consideration. As already pointed out, it was shown, and in fact was not denied, that, while a substantial consideration was named in the deed conveying the property to the decedent, no consideration passed to Mr. Herron or to the grantors from the grantee.

The claimant called as witnesses, in support of her claim, her father, J. A. Herron, her mother, and her mother's second husband, Mr. Stadtfeld. The appellants objected to the competency of Mr. and Mrs. Stadtfeld, but error is assigned to the admission of the testimony of Mrs. Stadtfeld only. They contend that the witness was incompetent on the ground that she is the surviving and remaining party to the contract, and, therefore, directly within the words of clause "e," section 5 of the Act of May 23, 1887, P. L. 158. This fact in itself is not sufficient to disqualify a witness. He must be not only a "remaining party" to the contract but must also have an interest adverse to the party against whom he is called to testify. This clause provides that where any party to a thing or contract in action is dead and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, no surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased, shall be a competent witness to anything occurring before the death of said party. It will be observed that to disqualify a witness under this clause he must not only be a surviving and remaining party to the thing or contract in action, but he must have an interest adverse to the right of the deceased party. This is clearly the correct interpretation of the clause,

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and we have so held: *Dickson v. McGraw Bros.*, 151 Pa. 98; *First National Bank of Bloomsburg v. Gerli*, 225 Pa. 256. The disqualification is made to depend not only on the fact of being a remaining party but also of having an adverse interest: *Dickson v. McGraw*, *supra*; and it is the adverse interest and not the adverse testimony that disqualifies a witness: *Horne & Co. v. Petty*, 192 Pa. 32. This claim is based on the parol contract and is made by Mrs. Cotton against the decedent's estate, and Mrs. Stadtfeld can have no interest in having it sustained. She is not a party to the litigation nor interested in sustaining the claim. Her interest is, therefore, not adverse to the estate. On the contrary, her interest is adverse to the claim if she be a residuary legatee, and if it be allowed and paid it cannot increase but will reduce her share in her mother's estate. It being apparent, therefore, that Mrs. Stadtfeld had no interest in the claim and, hence, no interest adverse to the estate of the decedent, we think she was a competent witness for the claimant.

The evidence is amply sufficient, if believed, to establish the oral contract and sustain the claim. Mrs. Stadtfeld's testimony is clear and explicit as to the terms of the agreement by which the decedent agreed to give Mrs. Cotton the sum paid by Mr. Herron on the purchase-price of the property. She says that the conveyance was made without any consideration passing to the grantors, and because Mr. Stadtfeld objected to her retaining any property acquired from her former husband. The purpose, therefore, of divesting herself of the title to the premises was to secure to her daughter the amount of money which Mr. Herron paid on the purchase-price. She further testified that her mother had frequently assured her that she would stand by the promise she made when the property was conveyed to her. Mr. Stadtfeld corroborated his wife's testimony as to the purpose of disposing of the property and as to the repeated assurance of the decedent to abide by her promise.

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Mr. Herron testifies that in the summer or fall of 1895 the decedent discussed with him the taking over of this property by her, and she repeatedly assured him that if she did take it over her granddaughter, Mrs. Cotton, should have everything that Mr. Herron put into it, and that in case of her death she would leave the house to the child or leave her the equivalent of the amount he had put into it.

Three sons and a daughter of the decedent were called to testify against the claim, but their testimony is simply to the effect that they did not hear their mother make the promise or reaffirm it, and did not hear of the claim until shortly before their mother's death. There was no substantial contradiction of the testimony introduced by the claimant, and, hence, the learned auditing judge very properly found that "the evidence by which the claim is established is uncontradicted."

It is claimed by the appellant that the decree is excessive in amount. The auditing judge, however, found that the amount invested in the property in cash by the claimant's father was \$3,333.01, and, on an exception filed, this finding was sustained by the court in banc. Such clear and manifest error in the court's conclusion has not been pointed out as would justify us in reversing the decree on this ground.

The other questions argued by the appellant are not in the case and do not require consideration.

The decree is affirmed.

**Royer v. Pennsylvania Railroad Company,
Appellant.**

Negligence—Railroads—Locomotive whistle—Deafening of fireman on locomotive on next track—Interstate commerce—Federal Employer's Liability Act—Fellow-servant rule—Failure to warn of blowing of whistle—Common knowledge—Evidence—Custom to warn—Admissibility.

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Syllabus—Statement of Facts.

1. When a locomotive fireman, employed by a railroad company on an engine engaged in drawing a train in interstate commerce, is injured, the Federal law governs and the fellow-servant rule is not applicable.

2. Where in an action by a locomotive fireman against a railroad company, engaged in interstate commerce, by which plaintiff had been employed, to recover for injuries to his hearing caused by the blowing of the whistle of another locomotive standing upon an adjoining track and within ten feet of plaintiff, it appeared that suddenly and without warning two loud shrill blasts were emitted from the whistle, and that plaintiff immediately felt a pain in his ear, and thereafter became totally deaf in such ear, but where there was no evidence to justify a finding that the experience or knowledge which an engineer might be expected to have should have warned the engineer who blew the whistle that he should first give notice to the plaintiff, the jury were not warranted in finding that defendant or its servants had reason to anticipate that the blowing of the whistle was likely to affect plaintiff injuriously, and a verdict for the plaintiff could not be sustained.

3. The effect upon bystanders of the blowing of a locomotive whistle, under such circumstances, is hardly a matter of common knowledge, and it must therefore be shown by evidence.

4. Where in such case it appeared that plaintiff offered to prove that it was customary to give warning to persons working within a distance of ten or fifteen feet of the whistle of an engine standing in the yard, before the whistle was blown, and that it was the general custom for those in charge of such an engine to look about for persons in close proximity to the engine whistle and to warn them that the whistle was about to be blown, the refusal of such offer on the part of the trial judge was error, and on appeal by the defendant from the judgment entered in favor of the plaintiff, the Supreme Court will not enter judgment for defendant n. o. v. but must grant a new trial.

Argued Oct. 12, 1917. Appeal, No. 131, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., July T., 1916, No. 342, on verdict for plaintiff in case of John M. Royer v. Pennsylvania Railroad Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Reversed.

Trespass for personal injuries. Before CARNAHAN, J. The opinion of the Supreme Court states the case.

Verdict for plaintiff for \$5,000 and judgment thereon.
Defendant appealed.

Error assigned, among others, was in refusing defendant's motion for judgment non obstante veredicto.

J. R. Miller, and *Thomas Patterson*, of *Patterson, Crawford & Miller*, for appellant.—There was not sufficient evidence of negligence on the part of the defendant: *Snyder v. Penna. R. R. Co.*, 239 Pa. 127; *Chittick v. P. R. T. Co.*, 224 Pa. 13; *Fox v. Borkey*, 126 Pa. 164.

T. M. Gealey and *A. J. Eckles*, for appellee.—Defendant was guilty of negligence under the circumstances: *Chesapeake & Ohio Railway Co. v. DeAtley*, 241 U. S. Rep. 310; *Valjago v. Carnegie Steel Co.*, 226 Pa. 514; *Hess v. American Pipe Manufacturing Co.*, 221 Pa. 67; *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 147 Pa. 40; *Applebaum v. P. R. T. Co.*, 244 Pa. 82.

The testimony of plaintiff's witnesses show that ear drums are frequently injured from pressure caused by the blowing of steam whistles: *McFadden v. City of Philadelphia*, 248 Pa. 83; *Stewart v. Central R. R. Co. of New Jersey*, 235 Pa. 311; *Snyder v. Pennsylvania R. R. Co.*, 239 Pa. 127.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

The plaintiff brought this action of trespass to recover damages for injuries resulting, as he claimed, from the negligence of an employee of defendant company. He was employed as a locomotive fireman, upon an engine drawing a train engaged in interstate commerce, so that the case is governed by Federal law, and the fellow-servant rule does not apply. The contention of the plaintiff is that, on April 24, 1914, his engine had stopped at a yard, en route, and was being supplied with water. He was at the time standing upon the tender holding the arm of a water spout. Another locomotive stood upon

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the adjoining track, the whistle being some ten feet from him. Suddenly and without warning there was emitted from the whistle of the adjacent locomotive, two loud, shrill blasts. He says he was shocked and startled, and immediately felt a pain in his ear, and that, after finishing the run for the day, he did not again return to the service of defendant, owing to the condition of his ear, and the necessity for medical treatment. He claims that his injury was due to the loud blasts of the whistle emitted close to his ear, without previous warning, and that the injury has resulted in complete loss of hearing in one ear.

The trial judge left to the determination of the jury the question whether, when the engineer blew the whistle, he should, as a man of reasonable prudence, have anticipated the danger of injury to the plaintiff, who was in rather close proximity to the whistle, and should, therefore, have given him warning before it was blown. The verdict of the jury must be accepted as a finding that under the circumstances, danger of injury to the plaintiff from the blowing of the whistle was reasonably to have been anticipated, and that the engineer was guilty of negligence in failing to warn plaintiff before blowing the whistle. From the judgment entered upon the verdict, defendant has appealed, and the question is, whether the verdict was justified by the evidence.

Admittedly, the question, whether plaintiff was injured as claimed, was for the jury; but counsel for appellant urge that there was no evidence which justified a finding that the experience or knowledge, which an engineer might be expected to have, should have warned him not to blow his whistle without first giving notice to the plaintiff. As the record stands, we think this point is well taken. In the evidence which was admitted, we can find nothing from which the jury were warranted in finding that defendant or its servants had reason to anticipate that blowing the whistle as alleged by plaintiff, at a distance of ten feet from where he was standing, was

likely to affect him injuriously. The effect upon bystanders of the blowing of a locomotive whistle, under such circumstances, is hardly a matter of common knowledge, and it should, therefore, have been shown by evidence. The record shows, however, that there was an offer of evidence, upon the part of plaintiff, to prove that it is customary to give warning to persons working within a distance of ten or fifteen feet of the whistle of an engine standing in a yard, as was this one, before the whistle is blown, and that it is the general custom for those in charge of such an engine to look out for persons in close proximity to engine whistles, and warn them that the whistle is about to be blown. This offer of evidence was excluded, upon the objection of counsel for defendant. If such a custom exists, it may fairly be inferred that it is based upon experience which has shown the danger of injury to bystanders from the blast of a whistle. Had the offer been admitted, and had the testimony come up to the terms of the offer, it might well have justified the jury in inferring that the engineer should have anticipated danger to plaintiff from blowing the whistle without warning, when plaintiff was in such close proximity to it; and that it was unusual for a locomotive whistle to be blown under such circumstances without warning. Counsel for defendant are not in a position to press an advantage arising out of a lack of evidence upon the part of plaintiff, when such evidence was improperly excluded upon their own objection. If the plaintiff were here upon appeal, alleging error in the exclusion of the testimony offered in this respect in his behalf, it would be necessary to sustain his appeal.

Upon the record as it stands, the judgment is reversed with a venire facias de novo.

Krenn, Appellant, v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Negligence—Railroads—Grade crossing—Pedestrian—Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Absence of lights on engine—Engine visible—Harmless error—Directed verdict for defendant.

1. Where a pedestrian is deaf a higher degree of care is imposed upon him at a railroad grade crossing.

2. When a pedestrian walks in front of a moving train, in spite of the information afforded by his eyes and ears and is immediately struck, he is guilty of contributory negligence.

3. It is a traveler's duty to keep a lookout while crossing railroad tracks as well as to stop before attempting to cross.

4. In an action against a railroad company to recover damages for death of plaintiff's husband, occasioned by his being struck by a locomotive at a grade crossing, a verdict was properly directed for defendant where it appeared that at the crossing in question there was a single track line with a switch on the near side; that plaintiff stopped, apparently to look and listen just before crossing the switch track, that no bell or whistle was sounded but that the evening was clear and deceased could have seen the engine in time had he looked; and that deceased was struck immediately after stepping upon the track.

5. In such case, where defendant's evidence was that the headlight and other lights on the engine were burning, the court improperly excluded evidence in rebuttal to show that there was no headlight on the engine, on the ground that such evidence should have been presented as part of plaintiff's case in chief; but where it appeared that the engine was clearly visible as it approached the crossing, such evidence could not have changed the result and its rejection was harmless.

Argued Oct. 12, 1917. Appeal, No. 135, Oct. T., 1917, by plaintiff, from judgment of C. P. Allegheny Co., Oct. T., 1917, No. 1527, on directed verdict in case of Mary Krenn v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a Corporation. Before MESTREZAT, POTTER, STEWART, MOSCHISKEE and WALLING, JJ. Affirmed.

Statement of Facts—Opinion of the Court. [259 Pa.

Trespass for personal injuries. Before MACFARLANE, J.

The facts appear by the opinion of the Supreme Court.

The trial judge directed a verdict for defendant upon which judgment was entered. Plaintiff appealed.

Error assigned, among others, was in directing verdict for defendant.

George P. Henning, for appellant.—The case was for the jury: *Pennsylvania R. R. Co. v. Garvey*, 108 Pa. 369; *Bard v. Philadelphia & Reading Ry. Co.*, 199 Pa. 94; *Arnold v. Philadelphia & Reading R. R.*, 161 Pa. 1; *Armstrong v. Pennsylvania R. R. Co.*, 212 Pa. 228; *Toban v. Lehigh & Wilkes-Barre Coal Co.*, 24 Pa. Superior Ct. 475; *Cromley v. Pennsylvania R. R. Co.*, 208 Pa. 445.

W. S. Dalzell, of *Dalzell, Fisher & Hawkins*, for appellee.—The doctrine that a person losing his life must be presumed to have exercised due care has no application where the evidence shows affirmatively all the circumstances of the accident. There can be no presumption as against facts which are proven: *Bernstein v. P. R. R. Co.*, 252 Pa. 581.

Evidence that defendant's locomotive had passed over the crossing without lights should have been presented in plaintiff's case in chief, and not having been so presented was not admissible in rebuttal: *Crane v. P. R. R. Co.*, 218 Pa. 560; *Stetson v. Croskey*, 52 Pa. 230; *Acklin v. McCalmont Oil Co.*, 201 Pa. 257.

Plaintiff having been struck contemporaneously with placing his foot on the rail, he was guilty of contributory negligence as a matter of law.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

This is an action of negligence for injuries sustained at a public grade crossing. The street in question

crosses the railway a short distance east of Traveskyn station in Allegheny County. There the railway extends in an easterly and westerly direction and consists of a single main track, on the south side of which is a switch. The track is straight for several hundred feet east and then bends to the north. One, at or anywhere within forty feet south of the track, can see a train approaching from the east for nine hundred feet. On the evening of August 24, 1916, as John Krenn, plaintiff's husband, reached the first rail of the main track, walking north in the street, he was struck and killed by a west bound engine thereon. Plaintiff's evidence tended to show that he stopped, apparently to look and listen, just before crossing the switch track. The engine had a caboose attached and there was some evidence on behalf of plaintiff that it was going at high speed and that the crossing whistle was not blown. Defendant's evidence fixed the speed from twelve to fifteen miles an hour and was to the effect that timely warning was given both by bell and whistle, and that the headlight and other lights on the engine were burning. In rebuttal, plaintiff made an offer tending to prove that there was no headlight on the engine, but this was excluded as being part of the case in chief. It was developed by witnesses for plaintiff that they saw and heard the approaching engine, also saw the deceased as he came to the crossing, and some saw the collision. The undisputed evidence shows that, while it was in the evening, the conditions were such that the deceased, had he looked, could have seen the engine in ample time. It was not storming and there was nothing else at or near the crossing to distract Mr. Krenn's attention. He had resided near there for seven years and was entirely familiar with the situation. The court below directed a verdict for defendant on the ground of contributory negligence, from which plaintiff took this appeal.

Deceased was struck just as he reached the main track, in other words he and the engine arrived at the point of

contact practically at the same instant. Others saw the engine at a considerable distance, and it is inconceivable that he could not had he looked in that direction. He was somewhat deaf but that imposed upon him a higher degree of care: *Flynn v. Pittsburgh Railways Co.*, 234 Pa. 335. The law is settled that one who walks in front of a moving train, in spite of the information afforded by his eyes and ears, and is immediately struck, is guilty of contributory negligence. Mr. Krenn was right by the track where he had a better opportunity to see the approaching engine than plaintiff's witnesses, and what they saw he might have seen. It is a traveler's duty to keep a lookout while crossing the tracks as well as to stop before attempting to do so. A verdict for plaintiff in the case at bar could not be sustained on the theory that the deceased was unable to see the engine in time to avoid the accident. We do not know why Mr. Krenn stepped in front of the engine, but a presumption that he used care cannot arise under the evidence: *Bernstein v. Penna. R. R. Co.*, 252 Pa. 581. In our opinion on the question of contributory negligence the court below properly directed a verdict for the defendant.

The proposed rebuttal evidence tending to show that there was no headlight on the engine might properly have been admitted, as it was in contradiction to that submitted for the defense, and was pertinent on the question of contributory negligence. Yet had such evidence been received it could not have changed the result, as under all the evidence the engine was clearly visible as it approached the crossing. So the rejection of that evidence did plaintiff no harm.

The assignments of error are overruled and the judgment is affirmed.

Jelic v. Jamison Coal & Coke Company, Appellant.

Negligence—Master and servant—Mines and mining—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to warn of danger—Instruction—Delegation—Custom—Fellow servant—Case for jury.

1. Where an employer delegates an older and experienced fellow servant of an inexperienced employee to instruct and qualify him for service, the employer is liable for the negligence or omission of the instructor, if, by reason of it, the employee suffers injury. A servant delegated to instruct the employee stands for this purpose in the place of the employer.

2. In an action against a coal mining company to recover for personal injuries sustained by a minor in defendant's employ due to the failure of the defendant to give him proper instructions as to the danger to which he might be subjected from unexploded charges having been left in the coal where he was directed to work, or as to the proper method of avoiding injury from such unexploded shots, the case is for the jury and a verdict for plaintiff will be sustained where it appeared that prior to the accident plaintiff had been employed in various coal mines for fourteen months, but with a limited experience in the use of explosives; that as a rule he had worked with experienced miners, but on the morning of the accident was working alone digging coal when he stuck his pick into the coal at a point five or six inches from a hole and an explosion immediately followed, causing the injuries complained of; that plaintiff was ignorant of the danger from unexploded shots in the coal, and had never been warned to look out for them or instructed as to the proper method of guarding against injury from them, although the testimony tended to show a custom to give such instruction.

3. In such case, although the failure to report the existence of the unexploded charges was due to the negligence of another miner, a fellow workman of the plaintiff, the fellow-servant rule is not applicable.

Argued Oct. 15, 1917. Appeal, No. 142, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., Oct. T., 1916, No. 78, on verdict for plaintiff in case of Mike Jelic, a Minor, otherwise known as Check No. 5, by his Brother and next Friend, Vincent Jelic, v. Jamison Coal

Verdict—Opinion of the Court. [259 Pa. & Coke Company, a Corporation. Before BROWN, C. J., POTTER, MOSCHZISKE, FRAZER and WALLING, JJ. Affirmed.

Trespass for personal injuries. Before SHAFER, P. J. The facts appear by the opinion of the Supreme Court. Verdict for plaintiff for \$2,000 and judgment thereon. Defendant appealed.

Error assigned, among others, was in refusing defendant's motion for judgment non obstante veredicto.

Robert W. Smith, of Moorhead & Smith, with him William S. Moorhead, for appellant.—A master is not answerable, as a rule, for an injury to adults with experience, nor for an injury to young persons who have had experience from which a knowledge of danger may reasonably be presumed and discretion which prompts one to take care of himself. Under this rule plaintiff's fourteen months' experience precludes him from recovery: *Stitzel v. Wilhelm Co.*, 220 Pa. 564.

The proximate cause of the injury was the negligence of a fellow servant, and defendant was not obliged, in the absence of actual knowledge of the existence of the particular danger, to anticipate that the fellow servant of the plaintiff would be negligent: *Crown Cotton Mills v. McNally*, 51 S. E. Repr. 13; *Klos v. Hudson River O. & I. Co.*, 77 N. Y. App. Div. 566; *Siddall v. Pacific Mills*, 162 Mass. 379; *Fay v. Wilmarth et al.*, 66 N. E. Repr. 410; *Melchert v. Smith Brewing Company*, 140 Pa. 448; *Lewis v. Wood*, 247 Pa. 545.

The danger which plaintiff encountered was a transitory danger which arose during the progress of the work and with respect to which there is no duty of instruction: *Miller v. American Bridge Co.*, 216 Pa. 559; *Eddleman v. Pennsylvania Co.*, 223 Pa. 318.

The duty of instruction of the particular danger in this case, if such duty existed, was the duty of the mine

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foreman, and for his neglect the defendant is not liable: *Bogdanovicz v. Susquehanna Coal Co.*, 240 Pa. 124.

T. M. Gealey, with him *A. J. Eckles*, for appellee.—Plaintiff was about fifteen or sixteen years of age and was not an experienced miner: *Long v. Greenough Red Ash Coal Co.*, 59 Pa. Superior Ct. 235.

There is a duty upon the defendant to warn plaintiff of the danger: *Standard Oil Co. v. Brown*, 218 U. S. Rep. 78; *Grace & Hyde v. Kennedy*, 99 Fed. Rep. 679; *Blaisdell v. Davis Paper Co.*, 77 Atl. Repr. 485; *Holshouser v. Denver Gas & Electric Co.*, 72 Pac. Repr. 289.

The duty to instruct inexperienced employees is an absolute common law duty resting upon the employer, and when the employer seeks exemption from such duty he must point to some express statute exempting him from such, or placing that duty on some one else; the duty to instruct was not that of the mine foreman: *Reeder v. Lehigh Valley Coal Co.*, 231 Pa. 563; *Roszina v. Howard Gas Coal Co.*, 251 Pa. 298; *Thorne v. Philadelphia Rapid Transit Co.*, 237 Pa. 20.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

In this action, the plaintiff, a coal miner formerly in the employ of the defendant company, sought to recover damages for injuries suffered by him, resulting, as he alleged, from the failure of the defendant to give him proper instructions as to the danger to which he might be subjected from unexploded charges having been left in the coal where he was directed to work, or as to the proper method for avoiding injury from such unexploded shots. It was contended upon behalf of defendant, that, under the facts of the case, it was under no duty to give him such instructions. It appears from the record that, prior to the accident, the plaintiff had been employed in various coal mines for some fourteen months, but, with a limited experience in the use of explosives. He testified that he had as a rule worked with experienced miners, but on the morning of the accident,

he was working alone digging coal, when he saw a hole in the face of the coal, about three feet above the ground. He stuck his pick into the coal at a point some five or six inches from the hole, and an explosion immediately followed, inflicting upon him severe injury. Plaintiff testified that he was ignorant of the danger of injury from unexploded shots in the coal, and had never been warned to look out for them, or instructed as to the proper method of guarding against injury from them. Other witnesses, experienced in coal mining, testified on his behalf that an unexploded shot or charge might have been left in the hole by a miner who had previously been working in the same room and that this charge might have been exploded by the blow from plaintiff's pick. The sufficiency of this explanation, as to the cause of the accident, was not seriously questioned by defendant, nor did it offer testimony which threw any further light upon the subject. In the course of his cross-examination of J. D. Humphries, a witness for plaintiff, counsel for defendant brought out, by a leading question, the fact that it is the universal custom with all mining companies to instruct miners, when they charge a hole that fails to go off, (which rarely happens), to put up a danger board, and leave that working place at once, and report the condition to the mine foreman, the assistant mine foreman, or the first boss. Admittedly no such instruction was given to plaintiff by the defendant in this case. It is true that the failure to report the existence of the unexploded charge was due to the negligence of another miner, a fellow workman of the plaintiff, and ordinarily an employer is not called upon to instruct an employee with respect to dangers which may result from the negligence of fellow servants. But in this instance the employer was carrying on a business involving some danger to its employees, and it appeared that defendant knew of the possibility of special danger from unexploded shots, and that it had adopted a special rule for the conduct of the miners to guard them against injury

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from that source. The defendant company was, therefore, bound to instruct its employees clearly and unequivocally with respect to that danger and as to the means of avoiding it. The stringency of the rule adopted for the guidance of the miners, in dealing with unexploded charges when they were discovered, shows that the mining companies fully appreciated the fact of possible danger from that cause. It appears from the testimony that a charge of dynamite or other explosive placed in the coal and fired by the use of an electric battery seldom failed to explode, but when one did miss fire, the miner was not expected or permitted to deal with the situation, but was required to report the circumstances, and the matter was turned over to one more skilled in the use of explosives. Unless the plaintiff knew of the danger to be apprehended from unexploded shots, he could not protect himself therefrom, and unless he knew of the rule of the company, made for his protection, he could not be expected to comply with what the company regarded as an important regulation. Plaintiff testified that he was not made acquainted with the danger to be incurred from an unexploded shot, and had no knowledge concerning it, and the court below could not have said, as a matter of law, that the danger was obvious to ordinary inspection. The testimony tends to show that it was the custom of older and experienced miners to instruct the inexperienced men associated with them partly for that purpose, with respect to the dangers of the business, and that this instruction should include directions for dealing with holes in the coal which, to the eye of an experienced miner, indicated that they might contain unexploded shots. Whether or not the defendant in this case depended entirely upon this method of instruction does not clearly appear from the testimony, but, if the employer delegated older and experienced fellow servants of the inexperienced men, to instruct and qualify them for service, it was liable for the negligence or omission of the instructor, if, by reason of it, the em-

ployee suffered injury. A servant delegated to instruct the employee stands for this purpose in the place of the employer, and the latter is liable for his default. In any event, it is clear from the evidence that it was the duty of the defendant to see that the plaintiff was duly warned of the danger of injury from unexploded shots remaining in the coal which he was directed to take out, a danger fully recognized by the defendant, but, according to his testimony, unknown to the plaintiff. Whether or not the defendant discharged its duty in this respect was a question of fact for the jury, and, under the evidence, the trial court would not have been justified in determining it as matter of law.

The assignments of error are overruled, and the judgment is affirmed.

Lafferty v. Supreme Council Catholic Mutual Benefit Association, Appellant.

Beneficial associations—Insurance companies—Distinction—By-laws of society—Death benefits—Failure to include by-laws in certificate—Evidence—Unauthorized circular by officer—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7—Case for jury.

1. A controlling test as to whether an organization is a beneficial association or an insurance company is whether the organization comes within the definition of the Act of April 6, 1893, P. L. 7, which declares that a fraternal beneficial association is a corporation, society or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries and not for profit, "and in which the payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member."

2. A society organized as a social institution with a provision for insurance not as a means of profit but in the exercise of a benevolent and fraternal purpose, and governed through a branch system with a form of initiation, requiring that an applicant can be admitted to membership only after investigation and report by the board of trustees of the branch, and a favorable ballot by the members present at a regular meeting, and requiring that the

designation of beneficiaries be limited to relatives or dependents of the member, or to a charitable institution of which he may be an inmate, and stipulating that no member may belong to two branches of the association at the same time, is a beneficial association and not an insurance company.

3. The Act of May 11, 1881, P. L. 20, providing that where an insurance policy refers to the constitution and by-laws of the insurer as forming part of the insurance contract, such constitution and by-laws shall not be admissible in evidence unless a copy thereof be attached to the policy, applies to insurance companies and not to beneficial associations.

4. In an action against such organization by the wife of a member, the statement of claim averred that plaintiff's husband had left home and had not been heard of for a period of more than seven years, and that the presumption of his death had therefore arisen. The by-laws of the association provided that "no time of absence or disappearance of a member, without proof of actual death, shall entitle his beneficiary, family or next of kin to receive any part or portion of the said fund," except only where the disappearance had been for a period of twenty years. The trial judge excluded the application for membership, the medical certificate and the constitution and by-laws of the association on the ground that these papers were not printed in or attached to the certificate as required by the Act of May 11, 1881, P. L. 20, relating to insurance companies. *Held*, (1) the defendant society was a beneficial association and not an insurance company, (2) the evidence referred to was improperly excluded, and (3) the court erred in giving binding instructions for the plaintiff.

5. In such case a circular issued by the grand secretary of the defendant without the proper authority of the organization, may be admissible as tending to modify or contradict some of the testimony of that official, but is not admissible as affecting the purpose or character of the defendant.

Ogle v. Barron, 247 Pa. 19, followed; *Marcus v. Heralds of Liberty*, 241 Pa. 429, distinguished.

Argued Oct. 17, 1917. Appeal, No. 175, Oct. T., 1917, by defendant, from judgment of C. P. Allegheny Co., July T., 1916, No. 305, on directed verdict for plaintiff in case of Katherine Lafferty v. Supreme Council Catholic Mutual Benefit Association, a Corporation. Before BROWN, C. J., POTTER, MOSCHZISKE, FRAZER and WALLING, JJ. Reversed.

Assumpsit on death benefit certificate. Before HAYMAKER, J.

The facts appear by the opinion of the Supreme Court.

Directed verdict for plaintiff for \$2,340 and judgment thereon. Defendant appealed.

Errors assigned, among others, were in refusing defendant's offer in evidence of membership application, medical examiner's certificate and constitution and by-laws of the defendant association (1), and directing verdict for plaintiff (2).

A. V. D. Watterson, for appellant.—The defendant is a beneficial association and not an insurance company: *Marcus v. Heralds of Liberty*, 241 Pa. 429; *Ogle v. Barron*, 247 Pa. 19; *Heasly v. Heasly*, 191 Pa. 539; *Fischer v. American Legion of Honor*, 168 Pa. 279; *Taylor v. Order of Sparta*, 254 Pa. 556.

The presumption of death arising from seven years' absence is rebuttable: *Keech v. Rinehart*, 10 Pa. 240.

George Y. Meyer, for appellee.—The death benefit certificate in the present case is in terms an insurance policy: *Helmbold v. Independent Order Puritans*, 61 Pa. Superior Ct. 164.

The Act of May 11, 1881, P. L. 20, relating to life and fire insurance policies is applicable.

The defendant is engaged in the carrying on of the work of a life insurance company and is to be classed as such: *Commonwealth v. Equitable Beneficial Association*, 6 Dauphin Co. 31; *Commonwealth v. Keystone Benefit Association*, 171 Pa. 465; *Berry v. Knights Templars' & Masons' Life Indemnity Co.*, 46 Fed. Repr. 439; *National Union v. Marlow*, 74 Fed. Repr. 775; *Taylor v. Order of Sparta*, 254 Pa. 556; *Marcus v. Heralds of Liberty*, 241 Pa. 429; *Lane v. American Relief Association*, 25 Pa. C. C. 129.

Absence from home for a period of seven years without

being heard from gives rise to a presumption of death: *Bradley v. Bradley*, 4 Wharton 173; *Burr v. Sim et al.*, 4 Wharton 150; *Freeman's Est.*, 227 Pa. 154.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

In this action of assumpsit Katherine Lafferty sought to recover from the Supreme Council Catholic Mutual Benefit Association the sum of \$2,000, with interest, being the amount of a certificate issued January 6, 1896, to John M. Lafferty, and payable upon his death to his wife, the plaintiff. In her statement of claim she averred that Lafferty left his home in the City of Pittsburgh on February 15, 1907, and has not been seen or heard of since, though extensive search and diligent inquiry has been made for him, and, therefore, the presumption of his death arose on February 15, 1914, at which time he was a member in good standing of the association.

Defendant admitted that, on February 15, 1914, Lafferty was in good standing, as a member of the association, but averred that he was subsequently suspended from membership, and later expelled, in accordance with certain provisions of the constitution and by-laws of the association. It further averred that proof of the actual death of Lafferty had never been filed with the association, and that the certificate in question had been issued in express terms subject to the laws, rules and regulations of the association, which contained, *inter alia*, a provision as follows: "No time of absence or disappearance of a member, without proof of actual death, shall entitle his beneficiary, family or next of kin, to receive any part or portion of said fund, except that when a member has disappeared, and has not been heard from for twenty years, and when, if living, it appears from our records that he would be seventy years of age" certain payments are to be made on specified conditions.

On the trial defendant's counsel offered in evidence Lafferty's application for membership, the medical cer-

tificate, and the constitution and by-laws of the association. Objection was made to the offer, on the ground that these papers were not printed in or attached to the certificate, and that, therefore, under the Act of May 11, 1881, P. L. 20, they formed no part of the contract and were not admissible in evidence. The objection was sustained, the trial judge holding that the defendant association was a life insurance company, and was not a beneficial association, and that its contract with Lafferty was a policy of life insurance, and was subject to the provisions of the Act of 1881. He refused a point submitted on behalf of defendant requesting binding instructions in its favor, and directed a verdict for plaintiff for the amount of her claim, with interest, amounting to \$2,340, which was duly rendered, and, from the judgment entered thereon, defendant has appealed.

The first assignment of error raises the important question in this case, as it complains of the action of the trial judge in excluding the application and the constitution on the ground that defendant is substantially an insurance company, and not a beneficial association. The Act of 1881 applies only to insurance policies, and does not affect certificates of membership in beneficial associations. Two of our late cases, in which the line of distinction has been drawn, are *Ogle v. Barron*, 247 Pa. 19, and *Marcus v. Heralds of Liberty*, 241 Pa. 429. In the former case the *Royal Arcanum* was held to be doing business as a beneficial association and not as an insurance company, and in the latter case it was held that the *Heralds of Liberty*, while issuing a certificate purporting to be that of a beneficial association, actually carried on an insurance business, and that its contracts were subject to the Act of 1881. In giving the reasons for holding that the *Royal Arcanum* was a beneficial association as distinguished from a life insurance company, we said, in *Ogle v. Barron*, 247 Pa. 19, 22, "The charter of the garnishee shows that it is incorporated 'for the purpose of fraternal union, aid to its members and their

dependents, the education, socially, morally and intellectually of its members, assisting the widows and orphans of deceased members, establishing a fund for the relief of sick and distressed members, etc.' The constitution sets forth that the objects of the order are 'to unite fraternally' its members, 'to give all moral and material aid in its power to its members and those dependent upon them,' 'to educate members socially, morally, and intellectually, and to assist the widows and orphans of deceased members, etc.' "

The act of incorporation, which constitutes the charter of defendant, the Catholic Mutual Benefit Association, provides: "Section 5. The object of this corporation shall be to improve the moral, mental and social condition of its members, and to educate them in integrity, sobriety and frugality, to endeavor to make them contented with their position in life, and to aid and assist members or their families, in case of death."

The declared objects of the two associations are practically the same, except that defendant undertakes only to aid members or their families in case of death, and not to establish a fund for the relief of sick and distressed members. In *Ogle v. Barron*, we further said (p. 22): "It was shown that the garnishee operates through subordinate councils, and that defendant's husband was a member of such a subordinate council. Before becoming a member, he was required to undergo investigation as to his qualifications for membership. He was also required to make certain pledges which related to his future conduct as a member of the council. These requirements are not consistent with the contention that the garnishee conducted the business of an insurance company, or that it did not maintain itself as a fraternal beneficiary association."

These statements are equally applicable to the present defendant. It operates through subordinate branches, another name for councils. Before becoming a member of a branch (by-laws, sec. 175) an applicant must pos-

sess certain qualifications, among which are the following: He must be of good moral character, must be between sixteen and fifty years of age, must be competent to earn a livelihood for himself and family, must have had the smallpox or have been successfully vaccinated, and (Sec. 34) must be a practical Roman Catholic. In order to retain his membership and participate in the beneficiary fund, he must continue to be a practical Catholic and perform his Easter duty. His spiritual qualifications are to be subject to the decision of his pastor, with the right of appeal to the bishop of the diocese. The section cited (34) expressly states: "No one whose claims to be a practical Catholic such pastor and bishop refuse to endorse can be admitted or retained in this association. This section shall never be altered or amended."

When an application has been made, it is required (Sec. 179) to be read at a regular meeting of the branch, entered on the record and referred to the board of trustees for investigation. They must inquire and report at the next regular meeting of the branches as to the character and fitness of the applicant to become a member. If their report be favorable the applicant is balloted for by secret ballot, and if approved is admitted. If the report of the trustees be unfavorable he is declared rejected, without debate. More than two black balls out of the first ten votes cast and more than one black ball out of any subsequent ten, are sufficient to prevent the election of the applicant. If the applicant is elected (Sec. 181) he must present himself for initiation at a regular meeting of the branch within one month of his election, and is not entitled to any benefit unless he has been duly initiated. Immediately upon his initiation, (Sec. 4) the financial secretary of the branch is required to forward the new member's application, with a report of his initiation to the grand secretary of the association, who must enter his name upon the roll of the branch in his office. Members (Secs. 218, 220, 235) may be sus-

pendent or expelled, after trial, for various causes other than the nonpayment of monthly beneficiary payments or branch dues. Every applicant (Sec. 177) must be recommended by two members in good standing in the branch to which his application is made, and have the statement of his pastor that he is a practical Catholic. A person (Sec. 176) cannot hold membership in two branches at one and the same time, nor can a resident of a city, town or village, where there is a branch of the association, be initiated into a branch in any other city, town or village, without the written consent of the pastor of his own parish.

All these requirements are consistent with the claim of defendant to be a beneficiary association, but they are not in keeping with the manner in which an insurance company is managed or controlled. This is particularly true with respect to the avowed purpose of the association to improve the moral, mental and social condition of its members, and to educate them in integrity, sobriety and frugality, and its endeavor to make them contented with their position in life. There was no evidence to show that the affairs of the association were conducted otherwise than in the manner prescribed by the constitution and by-laws, and the testimony of the officers, at the trial, indicated that the provisions of the constitution and by-laws were observed in practice by the supreme council and the subordinate branches. This was quite in contrast with the methods and the management disclosed in *Marcus v. Heralds of Liberty*, 241 Pa. 429, where it was determined that the defendant was doing business as an insurance company. Mr. Justice ELKIN there found (p. 435): "After a careful reading of all the evidence presented by this record we discover that but little attention is paid to the social, fraternal and benevolent features of the order; but, on the other hand, the plan of organization, the method of soliciting business, the emphasizing of the advantage of being insured, the minimizing and in large areas the elimination

of the lodge system and numerous other like features, all point to but one end; which is that, under the guise of a beneficial association, defendant is doing an insurance business. No matter by what name called the result is the same."

In the case at bar the facts do not justify any such conclusion. In the opinion in *Marcus v. Heralds of Liberty*, 241 Pa. 429, much stress was also laid on the fact that the officials of the order were paid large salaries, and that premiums were paid for bringing in new business. In the present case, it appears from the evidence that four officers of the defendant association receive modest salaries, from \$500 to \$3,000 a year, and that certain bonuses and expenses are paid for organizing new branches. The association pays no commission for bringing in new members.

After careful consideration of all the evidence we are clear that the facts of the present case bring it within the principle of the decision in *Ogle v. Barron*, supra, and that the defendant is a beneficial association. In discussing a similar question in *Fischer v. American Legion of Honor*, 168 Pa. 279, Mr. Justice FELL said (p. 285): "There is a material and fundamental distinction between philanthropic or beneficial associations, which issue benefit certificates to their members, and life insurance companies, which was pointed out in *Commonwealth v. Equitable Beneficial Association*, 137 Pa. 412, and has since been recognized in *Dickinson v. A. O. U. W.*, 159 Pa. 258, and in *Lithgow v. Supreme Tent, Etc.*, 165 Pa. 292. It appears from the charter and by-laws that the association defendant was organized for social, moral and intellectual purposes and for the relief of sick and distressed members. Insurance is not its only nor its primary object. It limits the persons and classes of persons who may be named as beneficiaries to 'the family, orphans or dependents' and provides that in the event of the failure of all such persons or classes of persons the sum due shall revert to the order. The amount

secured by the certificate is subject to deductions for relief benefits paid in case of sickness or disability to the member and for his funeral expenses. Where the beneficiary has died the member may name another. These provisions are in entire harmony with the object of the order as a fraternal and beneficial organization, and they are entirely incompatible with the vesting of an interest in the fund in the beneficiary before the death of a member. Such a construction would in many cases, by giving the fund to the legal representatives of the beneficiary, divert it entirely from the purpose intended by the member and for which the organization was formed." The decision in the case just cited was based largely upon the limitations placed upon the persons who might be named as beneficiaries, coupled with a provision that, in the event of the failure of all such persons, the sum due shall revert to the order. Similar limitations and provisions appear in the by-laws of the defendant here. Such provisions would, of course, have no proper place in a contract of life insurance. It will also be noted that in the Act of April 6, 1893, P. L. 7, a fraternal beneficial association is defined as a corporation, society or voluntary association, organized and carried on for the sole benefit of its members and their beneficiaries and not for profit, "and in which the payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member." Here again the application of this controlling test makes it clear that the defendant is properly to be classed as a beneficial association.

In the fifth assignment of error, complaint is made of the admission in evidence, against objection, of a circular issued by J. W. Sullivan, grand secretary. The only evidence in regard to the circular was that of Sullivan himself, who testified that it was an advertisement of his own, and not of the corporation, and that he did not have the authority of the supreme council to issue it. The circular may be admissible as tending to modify

or contradict some of the testimony of the witness, Sullivan, but it is not admissible as affecting the purpose or character of the defendant corporation.

To recapitulate, the evidence shows that the defendant is organized as a social institution, with the provision for insurance not as a means of profit, but in the exercise of a benevolent and fraternal purpose. It shows that the association is governed through a branch system with a form of initiation. It further shows that an applicant can be admitted to membership only after investigation and report by the board of trustees of the branch, and a favorable ballot by the members present at a regular meeting, and that the designation of beneficiaries is limited to relatives or dependents of the member, or to a charitable institution of which he may be an inmate. These and other characteristics shown are distinctly those of a beneficial association, and do not comport with the object, purpose, or methods of operation of an insurance company.

The first and second assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

St. Clair Borough, Appellant, v. Tamaqua & Pottsville Elec. Ry. Co. et al.

Jurisdiction, C. P.—Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness—Boroughs—Contracts—Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Practice, C. P.—Act of July 26, 1913, P. L. 1374—Trial by jury.

1. Since the Act of July 26, 1913, P. L. 1374, matters within the jurisdiction of the Public Service Commission, including the reasonableness of rates charged by public service corporations, must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy.

2. The decision of the Public Service Commission on the subject of rates is subject to review, and the courts are vested with

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the right and fixed with the duty of passing upon the record brought up on appeal, which record shall include the testimony, the findings of facts, if any, of the commission based upon such testimony, a copy of all orders made by the Commission in said proceedings, and a copy of the opinion, if any, filed by the commission.

3. In cases where, the parties had a right to trial by jury before the Act of 1913, such right is still preserved to them.

4. It is the duty of the reviewing court, if it shall find from the record that an order of the Public Service Commission appealed from is unreasonable, or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, to enter a final decree reversing the order of the commission, or, in its discretion, to remand the record to the commission with directions to reconsider.

5. The fact that no complaint is made to the Public Service Commission when an application for a change of rate is filed with that body, does not prevent any person affected thereby from subsequently entering a complaint.

6. Where a contract fixing a rate unlimited in time has been entered into by a public service company with a borough prior to the Act of 1913, the State has the right, under authority of that act, through the Public Service Commission, notwithstanding the contract, to inquire into and adjust the rate to a reasonable basis.

7. A bill in equity brought by a borough against a street railway company to restrain defendant either from running its cars over a certain route or from charging more than a certain fare, on the ground that the proposed increase of fare was unreasonable and that a contract existed with the borough under which the defendant was prohibited from charging a higher rate, was properly dismissed for want of jurisdiction where it appeared that the matter had not been submitted to the Public Service Commission.

8. In such case the borough should file its complaint with the Public Service Commission, and if the commission permits the increase, the borough can, on appeal, raise all questions properly involved in which it has an interest and have them passed upon by the courts.

Argued Oct. 18, 1917. Appeal, No. 292, Jan. T., 1917, by plaintiff, from decree of C. P. Schuylkill Co., Nov. T., 1917, No. 2, in Equity, dismissing bill in equity for injunction in case of The Borough of Saint Clair v. The Tamaqua and Pottsville Electric Railway Company, the Pottsville and Saint Clair Electric Railway Company,

464 ST. CLAIR BORO., Appel., v. TAMAQUA & P. E. RY. CO.

Statement of Facts—Opinion of the Court. [259 Pa. the Pottsville Union Traction Company, and the Eastern Pennsylvania Railways Company. Before BROWN, C. J., POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Bill in equity to restrain defendant from running cars over a certain designated route or to prohibit defendant from charging more than a five-cent fare thereon. Before BECHTEL, P. J.

The facts appear by the opinion of the Supreme Court.

The lower court dismissed the bill. Plaintiff appealed.

Errors assigned, among others, were refusal of injunction and dismissal of bill.

William Wilhelm, with him *J. Milton Boone*, for appellant.

Otto E. Farquhar and *F. C. Newbourg, Jr.*, with them *Byron A. Milner*, *M. M. Burke* and *Joseph deF. Junkin*, for appellees.—The regulation of fares and the construction of contracts in relation thereto, are exclusively within the jurisdiction of the Public Service Commission: Act of July 26, 1913, P. L. 1374; *Bellevue Borough v. The Ohio Valley Water Company*, 245 Pa. 114.

OPINION BY MR. JUSTICE MOSCHZISKER, January 7, 1918:

The Borough of St. Clair filed a bill in equity against the Tamaqua and Pottsville Electric Railway Company, the Pottsville and St. Clair Electric Railway Company, the Pottsville Union Traction Company, and the Eastern Pennsylvania Railways Company, praying that they either be restrained from running their cars over a certain designated route or prohibited from charging more than a five-cent fare thereon; September 18, 1917, the court below preliminarily enjoined the operation of the

cars; but, on September 25, 1917, the following decree was entered, "The court being of opinion that it has no jurisdiction, and, therefore, cannot maintain this injunction, under 245 Pa. 114, it is hereby ordered that the injunction be dissolved"; October 6, 1917, an additional decree was filed, as follows, "Counsel for the plaintiff having asked the court to dispose of the prayer for the granting of a preliminary injunction relative to the five-cent fare, in which the court is asked to grant an injunction to restrain the defendant company from charging a six-cent fare, we decline to grant any injunction, for the reasons heretofore given, to wit, that we have no jurisdiction in the case, under the decision heretofore cited"; plaintiff has appealed, and these two decrees are assigned as error.

It appears, *inter alia*, that in 1894 the Tamaqua and Pottsville Company was granted a municipal franchise to lay tracks in the plaintiff borough; that in 1906 another ordinance was approved, conferring the privilege of making certain extensions, wherein it was stipulated that not more than a five-cent fare should be charged; that later the rights possessed by the first named corporation passed to the other defendants and the street railway in question is now operated by the Eastern Pennsylvania Railways Company.

Plaintiff contends that the ordinance of 1906 is binding upon the defendant companies, and therefore the latter have no legal right to raise their fares from five to six cents, while the defendants contend that they never built the extensions granted by this ordinance, and for that reason it has no binding effect; further, that they have complied in all respects with the requirements of the Public Service Company Law of July 26, 1913, P. L. 1374, and are entitled to charge the increased rate; but the court below did not decide any of these contentions, holding, as stated in the above quoted decrees, that it had no jurisdiction, and citing the decision of this court

in Bellevue Borough v. Ohio Valley Water Co., 245 Pa. 114.

In the Bellevue Borough case, we decided two points of law: (1) That "hereafter, so long as the Act of 1913 [supra] remains in force, the question of the reasonableness of rates established by public service corporations must in the first instance be submitted to the Public Service Commission, when challenged," and we there said, "This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well" (p. 116); (2) Where contracts fixing a rate "unlimited" in time have heretofore been entered into by public service companies, the State has the right, through the Public Service Commission, notwithstanding the contract, to inquire into and adjust the rate to a reasonable basis; and, in this connection, we said: "We decided in [Turtle Creek Boro. v. Penna. Water Co., 243 Pa. 415] that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations" (see also Mt. Union Boro. v. Mt. Union W. Co., 256 Pa. 516, 520).

As before stated, the court below did not attempt to adjudge as to the binding force of the alleged contract here in question, i. e., the ordinance of 1906, but evidently based its decision upon our ruling in the Bellevue Borough case, to the effect that questions of rates to be charged by public service corporations must be passed upon in the first instance by the Public Service Commission, before any aspect of the matter involved can be brought before the courts for determination; and in this we see no error.

The Act of 1913, supra, does not deprive the courts of any ultimate power theretofore vested in them under the laws of the Commonwealth; it requires merely that,

when a rate is to be or has been increased by a public service corporation, all complaints concerning the change shall be first submitted to and passed upon by the Public Service Commission. In turn, the decision of the commission is subject to review, and the courts are vested with the right and fixed with the duty of passing upon the record brought up on appeal (*Boro. of Mt. Union v. Mt. Union W. Co.*, 256 Pa. 516, 518), "which record shall include the testimony taken therein, the findings of fact, if any, of the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission" (Article VI, Section 18). In cases where the parties theretofore had a right of trial by jury, it is still preserved to them (Article VI, Section 29, as amended by the Act of June 3, 1915, P. L. 779, 782; *New Brighton Boro. v. New Brighton W. Co.*, 247 Pa. 232, 241; *West Virginia P. & P. Co. v. Public Service Commission*, 61 Pa. Superior Ct. 555, 569); and in all instances it is made the duty of the reviewing court, if it shall find from the record "that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law," to "enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law" (Article VI, Section 24). The fact that no complaint is made to the commission, when a change of rate is filed with that body, does not prevent any person affected thereby from subsequently entering one (Article V, Section 4): *Baltimore & Ohio R. R. Co. v. Public Service Commission*, 66 Pa. Superior Ct. 403, 406. The commission is armed with ample facilities for making investigations, and the provisions of the statute afford it full means of enforcing its orders when entered; moreover, in change-of-rate cases, pending hearing, the

commission is expressly empowered to require the public service company involved to "furnish to its.....patrons a certificate.....of payments made by them in excess of the prior established rate" (Article V, Section 4), and subsequently, if an increase is denied, to make an order for reparation (Article V, Section 5).

The plaintiff borough in the present case may file its complaint and have it passed upon by the Public Service Commission, whose duty will be, not only to decide as to the reasonableness of the rate, but also to find all material facts in connection with the increase: *B. & O. R. R. Co. v. Public Service Commission*, supra, p. 413. Should the commission decide that the change of fare is unreasonable, then, so far as the borough is concerned, that will be the end of the matter; but, on the other hand, should that tribunal permit the increase, then, on appeal, the borough can raise all questions properly involved in which it has an interest, and have them passed upon by the courts.

Since the Public Service Company Law has been upon our books, we have consistently adhered to the rule that matters within the jurisdiction of the commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (*Bethlehem City Water Co. v. Bethlehem Borough*, No. 2, 253 Pa. 333, 337-8; *New Brighton Borough v. New Brighton Water Co. et al.*, 247 Pa. 232, 240, 241, 242); and it is plain that orderly procedure requires an adherence to this practice, otherwise different phases of the same case might be pending before the commission and the courts at one time, which would cause endless confusion. Under the established system, the commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well regulated review by the courts, where and when all questions of law may be raised and determined; and "this is so not because the courts have any desire to avoid the performance of duties cast upon them by the law, but

because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose. The disposition everywhere is to commit questions, relating to the regulation and to the rates of public service corporations, to the supervisory powers of special tribunals, and, concededly, matters of this character are within the domain of legislative action": *Bellevue Borough v. Ohio Valley Water Co.*, supra, p. 118; see also *York Water Co. v. York*, 250 Pa. 115, 118.

The assignments of error are overruled, and the orders appealed from are affirmed.

Williams et al., for use of, v. Notopolos, Appellant.

Landlord and tenant—Leases—Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Pleadings—Act of May 14, 1915, P. L. 483, Sec. 2—Practice, C. P.—Judgment on warrant—Framing issue—Evidence—Written instruments—Parol evidence—Fraud, accident and mistake.

1. Under the Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1, which is in force in Pennsylvania, all the rights and remedies under a lease, which belonged to the lessor, belong to the lessor's grantee.

2. A condition, on breach of which a tenant's interest may be terminated, is to be distinguished from a covenant the breach of which cannot, in the absence of a statutory provision to the contrary affect the tenant's interest but merely gives the landlord a right of action for damages, or, occasionally, a right to an injunction, or a decree for specific performance. Mere words of agreement, not contemplating a termination of the lessee's interest upon his default, create a covenant, and not a condition.

3. Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such, will make it a condition upon which the continuance of an estate granted depends. Where the language of an agreement can be resolved into a covenant the judicial inclination is so to construe it.

4. To justify a refusal to accept on the ground that work or ma-

terial must be satisfactory to the party acquiring it, the objection must be made in good faith and must not be merely capricious.

5. Under the rule that an uncertainty as to the meaning of a clause in a lease, is to be determined in favor of the lessee, the court will not construe a provision in a lease for confession of judgment in ejectment, on the breach of any of the "conditions" of the lease to include covenants and agreements, although covenants, agreements and conditions are placed substantially on the same basis, and a breach of either gives the lessors the right to declare a forfeiture.

6. A lease provided "lessee.....agrees that all plans for alterations, improvements and changes in said buildings shall be submitted to and be approved in writing by the said lessors, their duly authorized agents or attorneys, before any work is done or changes made in said buildings," and further provided "on the breach of any of the conditions of this lease" the lessor may obtain possession by means of an amicable action and confession of judgment in ejectment. Thereafter the lessor assigned the reversion and the lessee made improvements without the consent of the owner. There was evidence that the lessor's refusal was capricious and not made in good faith and solely for the purpose of enabling him to gain possession of the demised premises by forfeiture of the unexpired term of the lease. *Held*, (1) under the terms of the lease plaintiff is not entitled to an amicable action and confession of judgment in ejectment by reason of the alleged breach of the agreement that his plans should be submitted to and approved by the lessors, before he began work on the alterations; (2) the question of plaintiff's good faith in his refusal to approve the plans which defendant submitted to him is one of fact which should have been submitted to the jury, and (3) the trial judge erred in directing a verdict for plaintiff.

7. In such case evidence as to a conversation between the lessor and lessee in reference to an insertion in the lease of the clause as to alterations and of an alleged promise made by the lessor in regard to the alterations that would be permitted under such clause, was properly excluded where such conversation took place five days prior to the execution of the lease and there was no allegation that anything had been omitted from the lease by fraud, accident or mistake. Such evidence could not have been admissible even though the conversation had been contemporaneous with the execution of the lease.

8. In such case where the record consisted of a statement of claim, an answer by defendant in the form of a petition to open the judgment and a reply thereto by plaintiff, the pleadings sufficiently complied with the Practice Act of 1915, requiring that in

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actions of assumpsit "the pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense, and where a set-off or counterclaim is pleaded, the plaintiff's reply thereto," and plaintiff cannot complain in such case that the court erred in proceeding to trial without a formal issue having been framed. The better practice is to formally state the issue and to incorporate the questions to be decided by the jury into the order so that they can be answered specifically.

Argued Sept. 25, 1917. Appeal, No. 165, Oct. T., 1917, by defendant, from judgment of C. P. Cambria Co., Dec. T., 1913, No. 18, E. D., on verdict for plaintiff, in case of Homer D. Williams and John F. Williams, for use of George Panagotacos, now George Panagotacos, v. A. Notopolos. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Reversed.

Rule to open a confessed judgment entered by virtue of warrant in a lease. Before STEPHENS, P. J.

The opinion of the Supreme Court states the facts.

The court opened the judgment.

Verdict for plaintiff and judgment thereon. Defendant appealed.

Errors assigned were, rulings on evidence, and in refusing to enter judgment for defendant n. o. v.

J. Earl Ogle, Jr., and John M. Freeman, for appellant. —No forfeiture of the lease can be declared for breach merely of a covenant of the lease where the lease only provides for forfeiture in case of breach of the conditions thereof: *McClintock et al., Assignees, v. Loveless*, 5 Dist. Rep. 417; *McKnight v. Kreutz*, 51 Pa. 232; *Doe v. Jones*, 2 C. & K. 743; *Paschall v. Passmore*, 15 Pa. 295.

P. N. Shettig, of Kittell & Shettig, with him *L. Verde Rhue*, for appellee.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

From the record in this case, it appears that on June 17, 1913, the owners of a three-story brick building and lot of ground on Main street, Johnstown, leased the property to the defendant for a term of five years, with the right of renewal for five years more. It was contemplated that the lessee should make alterations and improvements to the building at his own expense, and the lease contained the following provision: "Lessee also agrees that all plans for alterations, improvements and changes to said buildings shall be submitted to, and be approved in writing by the said lessors, their duly authorized agents or attorneys, before any work is done or changes made in said buildings."

The lease also contained a clause authorizing, on the breach of any of its conditions by the lessee, the entry of judgment in ejectment against him, and the issuance of a writ of habere facias. There was also the following clause: "All rights and liabilities given to or imposed upon either or any of the parties hereto shall extend to and be binding upon and inure to the benefit of the heirs, executors, administrators and assigns of such parties."

Notopolos, the defendant, entered into possession, and shortly thereafter, on August 20, 1913, the lessors sold the leased premises to George Panagotacos. The grantee took the property subject to the lease, but it does not appear that it was ever assigned to him.

In August and September, 1913, Notopolos submitted to Panagotacos plans for proposed alterations of the building on the leased premises, but the latter declined to approve them, and, without his approval, the lessee proceeded to make the alterations shown by the plans. Thereupon Panagotacos caused judgment in ejectment to be entered against the lessee, alleging a violation of the condition quoted above, and issued a writ of habere facias, which was executed by the sheriff. Upon petition of the lessee, the court struck off the judgment, and set aside the execution, and the property was restored to his

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possession. On appeal this court reversed the order striking off the judgment, but opened it, and awarded a procedendo, with a stay of proceedings on the execution: *Williams v. Notopolos*, 247 Pa. 554.

No formal pleadings were filed, and no issue was framed by the court below. The trial resulted in a verdict for plaintiff by direction of the court.

In the first and second assignments of error, complaint is made of the court below for proceeding with the trial of the case, against the objection of counsel for plaintiff, without a formal issue having been framed. The Practice Act of May 14, 1915, P. L. 483, Sec. 2, provides that in actions of assumpsit "the pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense, and, where a set-off or counterclaim is pleaded, the plaintiff's reply thereto." The record in the present case contains a statement of claim, an answer by defendant in the form of a petition to open the judgment, and a reply thereto by plaintiff. This, in substance, meets the requirements of the act of assembly, although it is undoubtedly better practice, and aids the intelligent determination of the matter, to have the issue formally stated, and to incorporate the questions to be decided by the jury into the order, so that they may be answered specifically by the jury, in accordance with the practice commended in *Martin v. Kline*, 157 Pa. 473.

The third, fourth and fifth assignments of error, are to the action of the trial judge in sustaining objections to certain questions put by plaintiff's counsel upon cross-examination. These questions were rightfully excluded, as they were not properly cross-examination, and were irrelevant.

In the sixth, seventh, ninth and tenth assignments, it is alleged that the trial judge erred in excluding evidence of a conversation between the lessor and lessee, in reference to the insertion in the lease of the clause as to alterations, and of an alleged promise made by the lessor in regard to the alterations that would be permitted under

such clause. As this conversation took place on June 12, 1913, and the lease was not executed until June 17th, five days later, the alleged promise or agreement was not contemporaneous with the execution of the lease, and the evidence was properly excluded. There was no allegation that anything was left out of the lease by fraud, accident or mistake, and in the absence of such an averment, the terms of a written instrument are not to be varied by setting up a parol agreement, even though it was contemporaneous with the execution of the written document: *General Motors Truck Co. v. Philadelphia Paving Co.*, 248 Pa. 499; *First Nat'l Bank of Shickshinny v. Tustin*, 246 Pa. 151; *Crelier v. Mackey*, 243 Pa. 363.

The real question in this case, raised by several assignments of error, is whether the plaintiff had the right to enforce forfeiture of the lease for the reason assigned in his statement, and, if so, whether his good faith in so doing is a question for the jury.

The plaintiff, as owner of the reversion, is entitled under the Act of 32 Henry VIII, ch. 34, which is in force in Pennsylvania, to all the rights and remedies under the lease which belonged to his grantors, the original lessors. "After reciting, inter alia, 'that by the common law no stranger to any covenant could take advantage thereof but only such as were parties or privies thereunto,' the statute enacts that grantees or assignees of the reversion, or assignees of lessors, shall enjoy the same benefits and remedies which the lessors or grantors themselves had or enjoyed for the breach of any condition, covenant or agreement contained or expressed in leases or grants": *Jackson & Gross on Landlord & Tenant in Pennsylvania*, p. 526, Sec. 984. If the plaintiff is entitled to claim the benefits of the provisions of the lease, then the next question is, whether the agreement, on the part of the lessee, that his plans for alterations to the building shall be submitted to and approved by the lessor, before any work shall be done or changes made in the buildings, amounts

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to a condition or is merely a covenant? Conditions are "qualifications annexed by the lessor, whereby the estate granted may be enlarged, diminished, created or defeated, upon the happening of some contingent event": Jackson & Gross on Landlord & Tenant in Pennsylvania, Sec. 37, p. 33.

"The underlying principle of all conditions subsequent in grants of land is that they prescribe terms upon which the land shall revert to the grantor. The condition may be that subsequent to receiving the land the grantee must not do some particular thing or it may be that he must do some required thing. But, in either case, if the grantee fails to perform the condition, his right to the land ceases, and the estate reverts to the grantor as a matter of right; and he may enter or bring ejectment": Sims on Covenants which Run with Land, p. 20.

"A condition, on breach of which the tenant's interest may be terminated, is to be distinguished from a covenant, a breach of which cannot, in the absence of a statutory provision to the contrary, affect the tenant's interest, but merely gives the landlord a right of action for damages, or occasionally, a right to an injunction, or, a decree for specific performance. . . . Mere words of agreement, not contemplating a termination of the lessee's interest upon his default, create a covenant, and not a condition": 2 Tiffany on Landlord & Tenant, Sec. 194 (b), p. 1364.

In *Paschall v. Passmore*, 15 Pa. 295, cited by appellant, Mr. Justice BELL said (p. 307): "Where the language of an agreement can be resolved into a covenant, the judicial inclination is so to construe it; and hence it has resulted that certain features have ever been held essential to the constitution of a condition. In the absence of any of these, it is not permitted to work the destructive effect the law otherwise attributes to it. As proper to frame a condition, certain words are recognized, which, of their own nature and efficacy, without the addition of other words, are sufficient. Among these, three are

said to be most appropriate to make an estate conditional; namely, proviso, *ita quod*, and *sub conditione*."

In the present case, the wording of the clause in question is, "Lessee also agrees," etc., and it contains none of the expressions especially appropriate in framing a condition. It may fairly be regarded as merely a covenant. In the lease, however, covenants, agreements and conditions are placed substantially upon the same basis, and a breach of either gives the lessors the right to declare a forfeiture. But the "additional remedy" of obtaining possession by means of an amicable action and confession of judgment in ejectment, which is the remedy to which plaintiff has resorted, is given only "on the breach of any of the conditions of this lease." It would be possible to so construe this as to include covenants and agreements, but we see no necessity for such construction under the settled rule that any uncertainty as to the meaning of a clause in a lease is to be determined in favor of the lessee.

In *McKnight v. Kreutz*, 51 Pa. 232, cited by appellant as similar in practice to the case at bar, Mr. Justice STRONG said (p. 237): "Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such, will make it a condition upon which the continuance of an estate granted depends." We hold, therefore, that, under the terms of the lease, plaintiff is not entitled to an amicable action and confession of judgment in ejectment, by reason of the alleged breach of the agreement that his plans should be submitted to and approved by the lessors, before he began work on the alterations.

The question of plaintiff's good faith in his refusal to approve the plans which defendant submitted to him was a question of fact which should have been submitted to the jury. The rule of law, where work or material must be satisfactory to the party acquiring it, is stated in *Thayler Bros. v. Greisser Construction Co.*, 229 Pa. 512, by our Brother MOSCHZISKE as follows (p. 518): "The

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question for determination is not as to whether or not the one complaining ought to be satisfied, but solely as to the good faith of the dissatisfaction alleged. 'To justify a refusal to accept.....on the ground that it is not satisfactory, the objection should be made in good faith. It must not be merely capricious': *Singerly v. Thayer*, 108 Pa. 291." Citing also numerous later cases to the same effect.

The same testimony of defendant as to the actions of plaintiff when the plans were submitted to him, and the testimony of the witness, Rose, as well as plaintiff's own testimony as to his reasons for refusing to approve the plans, were sufficient to warrant the jury in finding as a fact that his refusal was capricious and not made in good faith, and was solely for the purpose of enabling him to gain possession of the demised premises by a forfeiture of the unexpired term of the lease. Whether or not there was an actual breach of the lease, depends upon the fact as to plaintiff's good faith in refusing to approve the plans.

The sixteenth and eighteenth assignments of error are sustained, and the judgment is reversed, with a venire facias de novo.

Mintz v. Tri-County Natural Gas Company, Appellant.

Contracts—Action on several contract—Presumption—Set-off—Joint debt—Affidavit of defense—Insufficient averments—Corporation defendant—Affidavit by person not officer—Insufficiency—Act of May 14, 1916, P. L. 483—Practice, C. P.

1. A claim due from plaintiff and others, jointly, cannot be set off in an action of assumpsit brought by plaintiff alone, because to allow such a set-off would compel the latter to pay individually a debt for which he is liable only when called upon jointly with others.

2. Two or more persons sued jointly may set off a debt due by the plaintiff to any one of them, and one of two joint obligees, with the

consent of the other, may use the obligation as an equitable defense in an action by the obligor against one of them alone.

3. At common law there are three distinct forms of obligations *ex contractu*: (1) joint, (2) several, and (3) joint and several. In an action on the first, it was necessary to sue all the obligors together, or the survivors of them; on the second, the obligors had to be sued separately; but on the third, the plaintiff could elect to sue separately or jointly.

4. The question whether a contractual promise, made by two or more persons, is joint, several, or joint and several, depends upon the intention of the parties as evidenced by the language employed in the agreement under consideration, the general rule being that, in the absence of an apparent intent to the contrary, such promises are presumed to be joint, and not several or joint and several.

5. The Practice Act of May 14, 1915, P. L. 483, providing that affidavits of defense shall be sworn to by the defendant or some person having knowledge of the facts, does not change the requirements theretofore existing for such affidavits when made by agents of corporations, who are not regular officers acting within the scope of their authority.

6. An affidavit of defense filed on behalf of a corporation is insufficient where it is not made by an officer of the corporation but by a person styling himself as "chief accountant," where there is nothing to show why it is not made by an officer of the corporation, and there is no averment that the affiant had personal knowledge of the facts averred.

7. In an action on a written contract to recover for natural gas sold defendant company, defendant filed an affidavit of defense, and a supplemental affidavit, averring by way of set-off that prior to the contract in suit the plaintiff and five other persons entered into a written contract with defendant whereby the former sold the latter all the gas from a certain other tract of land, but thereafter diverted such gas belonging to defendant to an amount in value exceeding plaintiff's present claim. The affidavit of defense was made by the chief accountant of the defendant but did not state that he was an officer of the corporation. *Held*, judgment was properly entered for plaintiff for want of a sufficient affidavit of defense.

Argued Sept. 25, 1917. Appeal, No. 38, Oct. T., 1917, by defendant, from judgment of C. P. Clarion Co., Aug. T., 1916, No. 109, for want of a sufficient affidavit of defense, in case of David Mintz v. The Tri-County Natural Gas Company, a corporation. Before BROWN, C. J.,

MINTZ v. TRI-COUNTY NAT. GAS CO., Appellant. 479
1918.] Statement of Facts—Opinion of the Court.

MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and
WALLING, J.J. Affirmed.

Assumpsit for gas sold under a written contract.

Rule for judgment for want of a sufficient affidavit of
defense. Before SLOAN, P. J.

The opinion of the Supreme Court states the facts.

The court entered judgment for plaintiff for want of a
sufficient affidavit of defense. Defendant appealed.

Error assigned was the order of the court.

George F. Whitmer, for appellant.

A. A. Geary, with him F. J. Maffett, H. M. Rimer and
W. W. Hindman, for appellee.—The defendant cannot
set off in this action, a claim for damages for breach of an
agreement made by plaintiff and other parties: Schal-
cher v. Bergdoll, 41 Pa. Superior Ct. 547; Jackson v.
Clymer, 43 Pa. 79; Milliken & Co. v. Gardner, 37 Pa.
456; M'Dowell v. Tyson, 14 S. & R. 300.

OPINION BY MR. JUSTICE MOSCHZISKER, January 7,
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David Mintz, the plaintiff, sued in assumpsit to recover
\$3,786.07 for natural gas sold to the Tri-County Natural
Gas Company, the defendant, under a written contract.
Defendant filed an affidavit of defense, followed by a
supplemental affidavit, wherein it averred a set-off, in
effect, as follows: That, prior to the contract in suit,
plaintiff and five other persons, naming them, entered
into another written contract with defendant, whereby
the former sold to the latter all the gas under and from a
certain other tract of land; that, notwithstanding this
contract of sale, plaintiff, before the accruing of the
claim in suit, "without the consent of defendant" and
"without right or warrant in law or equity," entered
upon the land covered by the lease just mentioned and

disconnected defendant's gathering lines, connecting them with those of another gas company, thus "wrongfully" diverting gas belonging to defendant to an amount in value exceeding plaintiff's present claim; that defendant had a contract of sale with another gas company, under which the fluid wrongfully taken by plaintiff had been disposed of at a price, as stated in the affidavits of defense, exceeding the purchase price defendant was to pay therefor; that the act of plaintiff in wrongfully converting and appropriating defendant's gas, and the former's "failure to deliver or permit the said gas to be delivered to defendant," had prevented and was preventing the latter from making delivery thereof to its vendee, and that this had caused a loss to defendant of the difference between the price it was to pay for the fluid in question and the price at which it had sold the same, stating quantity and prices; hence, that there was "now due and owing from plaintiff to defendant, on account of gas abstracted and diverted by plaintiff as aforesaid, after deducting plaintiff's claim [in suit], the sum of \$598.27," for which defendant asked a certificate. Judgment was entered in favor of plaintiff for want of a sufficient affidavit of defense, and defendant has appealed.

In a written opinion accompanying the order for judgment, the court below states the view that, since the cause of action averred by defendant against plaintiff, by way of set-off, is "a tortious taking of the property of defendant by plaintiff," and, since the affidavits of defense contain no sufficient averment that the tort-feasor had sold the converted property, defendant's claim is in trespass and, therefore, cannot be allowed as a set-off in the present action of assumpsit; furthermore, that, since the affidavits are not made by an officer of the defendant company, but by one styling himself "chief accountant," in that particular they are insufficient for want of essential averments.

The defendant contends that it has a right to waive the tort and treat its counterclaim against plaintiff as a

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breach of contract; and that, from this point of view, such claim is available as a set-off. The difficulty with this contention is that the contract alleged to be breached is not simply between the present plaintiff and defendant, but it is a written agreement, or gas lease, executed by plaintiff and five other persons, as lessors, and defendant, as lessee; if, therefore, plaintiff's alleged tortious act, in diverting the gas thus sold to defendant, is to be treated merely as a failure to deliver in accordance with the contract, then all six lessors are jointly liable for this breach of their covenant, and defendant cannot of his own volition single out any one of them as the object of a suit based upon such default, which is the effect of the set-off averred in the affidavits of defense.

The question whether a contractual promise, made by two or more persons, is joint, several, or joint and several, depends upon the intention of the parties as evidenced by the language employed in the agreement under consideration, the general rule being that, in the absence of an apparent intent to the contrary, such promises are presumed to be joint, and not several or joint and several: *Philadelphia v. Reeves & Cabot*, 48 Pa. 472; *Pittsley v. King*, 206 Pa. 193; *Morrison v. American Surety Co.*, 224 Pa. 41; *Boltz v. Muehlhof*, 37 Pa. Superior Ct. 375, 380. As said by our present Chief Justice in *Pittsley v. King*, *supra* (p. 196), "It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly, and words of severance are necessary to overcome this primary presumption." In the present instance, no such words appear; hence we say that the plaintiff and his fellow lessors are all jointly liable for a failure to deliver the oil sold to defendant, and the latter cannot maintain a suit against plaintiff alone for such a breach of contract. At common law, there are three distinct forms of obligations *ex contractu*, i. e., (1) joint, (2) several, and (3) joint and several. In an action on the first, it was necessary to sue all the obligors together, or the survivors of them;

on the second, the obligors had to be sued separately; but, on the third, the plaintiff could elect either to sue separately or jointly: 9 Cyc. 651 et seq.; 30 Cyc. 121. Except where changed by statute, these principles are still applicable: 9 Cyc. 654, and n. 35. Since the defendant cannot maintain a suit against the present plaintiff alone, for the breach of contract which it contends it has a right to take advantage of in this action, it follows that the defendant is not in a position to use this alleged breach in defense, as a set-off; for the rule requiring mutuality of debts, where set-off is pleaded, forbids the setting off of a joint debt against a separate one: 34 Cyc. 712, 727, 730. "Mutuality of debts is the essential circumstance in set-off": *Cramond et al., Exrs., v. Bank of U. S.*, 1 Binn. 64, 69; *McDowell v. Tyson*, 14 S. & R. 299; see also *Milliken & Co. v. Gardner*, 37 Pa. 456; *Schalcher v. Bergdoll*, 41 Pa. Superior Ct. 547, 550-1; and, on the general subject involved, *Hibert v. Lang*, 165 Pa. 439. The cases which hold that two or more persons sued jointly may set off a debt due by the plaintiff to any one of them (*Childerston v. Hammon*, 9 S. & R. 68; *Stewart v. Colter*, 12 S. & R. 252; *Cochran v. Cutter*, 18 Pa. Superior Ct. 282) have no application here, since they rest upon the theory that defendants have the right to agree among themselves as to the adjustment of the proceeds of the set-off, and hence no harm is done to any one. This rule also permits one of two joint obligees, with the consent of the other, to use the obligation as an equitable defense in an action by the obligor against one of them alone (*Smith & Co. v. Myler & Aber*, 22 Pa. 36; *Cochran v. Cutter*, *supra*), for, again, no harm is done; but a claim due from plaintiff and others jointly cannot be set off in an action by plaintiff alone, because to allow such a set-off would compel the latter to pay, individually, a debt for which he is liable only when called upon jointly with others. None of the cases above cited is precisely like the one at bar, but a discussion of relevant ruling principles will be found therein.

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While we do not adopt the views of the learned court below as the basis of our decision that the counterclaim was properly refused, yet, for the reasons we have stated, it is apparent that, when treated as a breach of contract, defendant's claim against plaintiff is no more available, by way of set-off, than when considered as an action sounding in tort; therefore, no error was committed in declining so to allow it in defense.

The propriety of the ruling on the question of the attempted set-off is the sole point raised by appellant's statement of the "question involved," and we might well confine our consideration thereto (*Spang v. Mattes*, 253 Pa. 101, 103-4; *Hopkins v. Tate*, 255 Pa. 56, 62); but we shall briefly pass upon the point of practice referred to in the opinion of the court below. The affidavits in question not having been made by an officer of the defendant corporation, the court rightly viewed them as insufficient for want of essential averments. As President Judge SLOAN says, "The affidavits are made by one A. J. Hamilton, chief accountant of the corporation, but it is not stated that he is an officer of the corporation, nor why the same was not made by an officer of the corporation, and it is not averred that he has personal knowledge of the facts.....In the supplemental affidavit he states that he has a knowledge of the facts, and that he is duly authorized by the corporation to make and file this supplemental affidavit; but there is nothing in the supplemental affidavit of defense that in any way relates to the original affidavit which would cure the defects in it [the original]; and, as it [the supplemental] neither states nor alleges why it is not made by an officer of the corporation, it is open to the same objection." In addition, it may be said that, although the affiant avers that he "believes and expects to be able to prove" the facts therein stated, in neither affidavit does he claim personal knowledge, or that he makes the averments thereof after investigation or upon information imparted to him by one possessing personal knowledge. In short, he neither

claims to be an officer who would naturally possess a knowledge of the facts averred in the affidavits, nor does he attempt to state the sources of his information or even formally to allege that he makes the averments contained therein upon "information and belief"; moreover, he fails to aver how he is "duly" authorized. Hence, the affidavits are insufficient to prevent judgment.

True, the Practice Act of May 14, 1915, P. L. 483, provides that affidavits of defense "shall be sworn to by the defendant or some person having knowledge of the facts"; but this provision in no way changes the requirements laid down in our prior cases for such affidavits when made by agents of corporations who are not regular officers acting within the scope of their authority. For discussion of this point, see the opinion written by Mr. Justice MESTREZAT in *Wakely v. Sun Insurance office of London, Eng.*, 246 Pa. 268, 271, 274-5; and, on the general subject involved, see *Griel v. Buckius*, 114 Pa. 187, 190; see also *Yeier v. Hanover Fire Ins. Co.*, 63 Pa. Superior Ct. 258; *Galashevsky v. Camden Fire Ins. Co.*, 63 Pa. Superior Ct. 511; *Yeier v. Camden Fire Ins. Asso.*, 66 Pa. Superior Ct. 571; and, for an example of a sufficient averment, see *Giordano v. St. Paul Fire & Marine Ins. Co.*, 63 Pa. Superior Ct. 233, 236.

The assignment of error is overruled and the judgment is affirmed.

Croyle, Appellant, v. Johnstown Water Company.

Water companies—Eminent domain—Territorial rights—Special charter—Power to furnish within city limits—Incidental furnishing to suburban districts—Effect of Constitution of 1873—Acceptance of Act of April 29, 1874, P. L. 73—Ultra vires acts—Right of private parties—Remedy by Commonwealth—Act of June 19, 1871, P. L. 1360—Bill in equity—Injunction—Dismissal.

1. Where the taking of water by a water company is mainly for the purpose of supplying citizens within the proper territorial limits

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of the company, the furnishing of a small supply to persons outside of the limits is a mere incident of the main purpose and the taking will not be enjoined.

2. A water company has the right to condemn as much water as is reasonably necessary, not only for present purposes, but for future needs.

3. A water company incorporated by a special act for the purpose of supplying water to five boroughs named and the vicinity thereof, did not lose its charter rights, at the adoption of the Constitution of 1873, or by its acceptance of the Corporation Act of April 29, 1874, P. L. 73, and where the boroughs were subsequently consolidated into a city, the corporation did not exceed its charter rights by supplying water in the vicinity of such city, where it did so merely as an incident to the business of supplying water to the city.

4. Where the true purpose of condemnation of water by a water company is to furnish a territory beyond the original charter limits, such question can be inquired into only by the Commonwealth upon an appropriate proceeding, but not by a bill in equity under the Act of June 19, 1871, P. L. 1360, at the instance of a private person; and a bill in equity alleging such purpose and seeking to enjoin such taking was properly dismissed.

Practice, Supreme Court—Equity—Final decree—Quashing appeal.

5. Where on bill in equity no final decree is entered after overruling exceptions, a motion to quash the appeal will prevail, but in the absence of such motion the case will be decided on the merits.

Argued Sept. 26, 1917. Appeal, No. 111, Oct. T., 1917, by plaintiff, from decree of C. P. Somerset Co., Equity Docket, 1910, No. 14, refusing an injunction, in case of Elsie Croyle v. Johnstown Water Company. Before MESTREZAT, POTTER, STEWART and MOSCHZISKEB, JJ. Affirmed.

Bill in equity for an injunction. Before BAILEY, P. J.
The opinion of the Supreme Court states the facts.

The court on final hearing dismissed the bill. Plaintiff appealed.

Errors assigned were in dismissing exceptions to various findings of fact and conclusions of law, and the decree of the court.

Argument—Opinion of the court. [259 Pa.

J. A. Berkey, with him *Norman T. Boose*, for appellant.—The Johnstown Water Company's charter of April 11, 1866, P. L. 723, was limited by acceptance of the Constitution of 1873 and the Act of April 29, 1874, P. L. 73, relating to corporations, and it has no right to supply water outside of its district: *Wallace v. Lehigh Water Co.*, 1 Northampton Co. 117; *West Easton Spring Water Co.*, 9 D. R. 546; *Tyrone Gas & Water Co. v. Tyrone Boro.*, 195 Pa. 566; *Bly v. White Deer Mt. Water Co.*, 197 Pa. 80.

J. C. Davies, with him *Uhl & Ealy*, for appellee.—The right of this company to supply water in the vicinity of Johnstown was decided in *Blauch v. Johnstown Water Co.*, 247 Pa. 71.

If the defendant in the exercise of its corporate powers, makes an improper use of the water which it takes, it is answerable to the Commonwealth alone. The plaintiff has no standing to ask the court to pass upon any such alleged misbehavior: *Blauch v. Johnstown Water Co.*, 247 Pa. 71; *Mier v. Citizens Water Co.*, 250 Pa. 536.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

This was a bill in equity, praying for an injunction to restrain the defendant company from appropriating the water of the north fork of Ben's Creek, in Somerset County, and from entering upon and laying pipes or water mains upon or through plaintiff's land. After hearing upon bill, answer and proofs, the trial judge directed a decree nisi to be entered, refusing an injunction and dismissing the bill at the costs of plaintiff. Exceptions were filed and overruled, but there was no final decree. If, for that reason, counsel for appellee had moved to quash this appeal, the motion must have prevailed.

The first question here involved, as stated by counsel for appellant, is as follows: "Does a water company chartered by a special act of assembly prior to the Con-

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stitution of 1873, and the Corporation Act of April 29, 1874, P. L. 73, for the purpose of supplying water to five adjacent boroughs and vicinity, by accepting the Constitution and the provisions of said act and supplements thereto, have power, after the consolidation of said five boroughs together with large additional territory into a new municipality, to furnish water to all the territory embraced within said new municipality, and to other separate municipalities in the vicinity thereof?" In *Blauch v. Johnstown Water Co.*, 247 Pa. 71, it was held that the Johnstown Water Company, the present appellee, has the right to supply water in the entire City of Johnstown, and for that purpose to exercise the power of eminent domain. It is, however, contended that the decision in that case does not rule the question here raised, because the water company is seeking to appropriate the water of Ben's Creek and a right of way over plaintiff's land "for the purpose of supplying water to a number of municipalities outside of its charter limits, although adjacent to and in the vicinity thereof." It is true that defendant is supplying water to persons outside the limits of Johnstown, but such supply is incidental to its main purpose, which is the supply of water to the public in the City of Johnstown, so that the case falls within the principle of *Mier v. Citizens Water Co.*, 250 Pa. 536, in which it was held (syllabus), "where the taking is mainly for the purpose of supplying citizens within the proper territorial limits of the company, the furnishing of a small supply to persons outside of the limits is a mere incident of the main purpose and the taking will not be enjoined."

The defendant company was originally incorporated by a special act of assembly approved April 11, 1866, P. L. 723, for the purpose of introducing water into the five boroughs named in the act, "and the vicinity." The trial judge has found, as a fact, that the territory outside the City of Johnstown, which is supplied by defendant com-

pany, is in the vicinity of the boroughs named in its charter.

In *Blauch v. Water Co.* (*supra*), it was held "that the water company neither lost nor surrendered, in accepting the provisions of the Act of 1874, the franchise or privilege, specially conferred upon it by the Act of 1866, to supply five named boroughs with water." It naturally follows that the right to supply the territory in the vicinity of the five boroughs survived in like manner. Counsel for appellant rely upon the case of *Bly v. White Deer Mt. Water Co.*, 197 Pa. 80. But there the water company attempted to supply water directly to the public in townships and municipalities, to which its charter did not admit it. In the present instance the supply of water to outside territory is incidental. The *Bly* case has been distinguished in later decisions: *Bland v. Tipton Water Co.*, 222 Pa. 285; *Blauch v. Johnstown Water Co.*, 247 Pa. 71, 77; *Mier v. Citizens Water Co.*, 250 Pa. 536, 540. But, aside from this, as the court below very properly said: "If the true purpose of this condemnation was to furnish a territory beyond the original charter limits, that is a matter to be inquired into by the State upon an appropriate proceeding, but not by a bill in equity under the Act of June 19, 1871, P. L. 1360, at the instance of a private person."

Counsel for appellant also question the right of defendant company to appropriate a water supply in anticipation of future needs. The trial judge, however, found as a fact, upon sufficient evidence, that there was "a reasonable necessity" for the appropriation and use of the waters of the north fork of Ben's Creek, in addition to the sources of supply previously appropriated. The company had the right to condemn as much water as was reasonably necessary, not only for present purposes, but for future needs. See *Boalsburg Water Co. v. State College Water Co.*, 240 Pa. 198.

The assignments of error are overruled, the decree of the court below is affirmed, and this appeal is dismissed at the cost of appellant.

Snyder et al., Appellants, v. Berkey et al.

Municipalities—Official bonds—Default—County auditors—Audit—Failure to appeal—Sureties—Liability for defalcation of principal—Judgment for defendant.

1. An action at law will not lie on an official bond until there has been an accounting before the county auditors, who constitute a special tribunal, created by statute for the purpose of adjusting the accounts of such officers and determining the amount due to or from them. This decision, unappealed from, is conclusive and precludes an action at common law for an unadjudicated account.

2. The sureties on an official bond given by the treasurer of the directors of the poor, will not be liable for an embezzlement committed by the principal, where it appears that the books, vouchers and other documents, relating to the accounts of the treasurer, were submitted to the county auditors and audited, and no defalcation was found; and it is not material that the attention of the auditors was not called to the items for which the action was brought.

Argued Sept. 26, 1917. Appeal, No. 122, Oct. T., 1917, by plaintiffs, from judgment of C. P. Somerset Co., Sept. T., 1913, No. 70, for defendants, in case of J. J. Snyder, J. C. Miller and J. C. Deitz, Directors of the Poor and of the House of Employment of Somerset County, Pennsylvania, v. J. A. Berkey, H. L. Sipe and H. F. Barron. Before MESTREZAT, POTTER, STEWART, MOSCHISKEE and FRAZER, JJ. Affirmed.

Assumpsit on an official bond. Before RUPPEL, P. J. The opinion of the Supreme Court states the facts.

The case was tried by the court without a jury.

The court entered judgment for defendants. Plaintiffs appealed.

Errors assigned were in dismissing exceptions to various findings of fact and conclusions of law and the judgment of the court.

Francis J. Kooser, with him *P. G. Cober* and *Ernest O. Kooser*, for appellants.—The defendants are liable on the bond for the several embezzlements of the principal and their liability may be determined in this action as neither item, nor any account, book, voucher or other paper relating to the said embezzlements was ever submitted to the county auditors.

The bond having been voluntarily given for a lawful purpose, may be enforced according to its terms: *Clement v. Courtright*, 9 Pa. Superior Ct. 45; *U. S. v. Hodson*, 10 Wall 395; *Slutter v. Kirkendall*, 100 Pa. 307; *Clark v. Morss*, 142 Pa. 311; *Sullivan v. Middendorf*, 7 Pa. Superior Ct. 71; *Castors' App.*, 2 Penny. 337; *Com. v. Clipsham*, 16 Pa. Superior Ct. 50.

Norman T. Boose, with him *J.A. Berkey*, for appellees.—The court had no jurisdiction, in the absence of proof that the amount claimed had been found due from the principal on the bond by the county auditors: *Northampton Co. v. Yohe*, 24 Pa. 305; *Blackmore v. Allegheny Co.*, 51 Pa. 160; *Siggins et al. v. The Com.*, 85 Pa. 278; *Northampton Co. v. Herman*, 119 Pa. 373; *Schuylkill Co. v. Boyer*, 125 Pa. 226; *Westmoreland Co. v. Fisher*, 172 Pa. 317.

PER CURIAM, January 7, 1918:

This is an action of assumpsit on the official bond of *H. F. Barron*, treasurer of the directors of the poor and of the House of Employment of Somerset County, Pennsylvania, for 1912, on which *Berkey* and *Sipe*, the other two defendants, were sureties. In September, 1912, the treasurer, in his official capacity, received \$1,100 and in January, 1913, \$2,262, both of which sums he failed to charge himself with in his book as treasurer and which he appropriated to his own use. At the trial before the court below, under the Act of 1874, it appeared that the books, vouchers and other documents relating to the accounts of the treasurer for the year 1912 were submitted

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to the county auditors by the treasurer, and that the accounts were audited by the auditors, as required by law, in January and February, 1913. The report of the auditors was filed, from which no appeal was taken, and the same became absolute. The attention of the auditors was not called to the two items sued for in this action and they were not audited, and hence were omitted from the auditors' report. The amount found by the auditors to be due from Barron was subsequently paid by him to his successor in office. The learned court directed judgment to be entered for the defendants, Berkey and Sipe, holding that the \$1,100 was an item to be passed on by the county auditors in their annual settlement in 1913, and their report unappealed from was conclusive upon all parties, and the item of \$2,262 not having been submitted to the county auditors for adjustment and there being no report thereon by the auditors, a common law action would not lie.

The learned court was clearly right in entering judgment for the defendants. The decisions of this court, and they are numerous, are uniform in holding that in such cases, and under the facts presented by this record, an action at law will not lie on the official bond until there has been an accounting before the county auditors. This is a special tribunal created by statute for the purpose of adjusting the accounts of such officers and determining the amount due to or from them. Its decision unappealed from is conclusive, and precludes an action at common law on an unadjudicated account.

The judgment is affirmed.

**Ramage v. Producers' & Refiners' Oil Company,
Appellant.**

Negligence—Oil companies—Fires—Origin—Engines—Hot tube method—Dangerous machinery—Custom of business—Proximate cause—Case for jury.

1. In an action against an oil company to recover damages for injuries to plaintiff's premises caused by fire alleged to have been communicated from defendant's pumping station, the case is for the jury and a verdict for the plaintiff will be sustained where it appeared that the engines in such station were equipped with the hot tube method of ignition causing an open flame to come in contact with escaped oil, and such method of operation was more dangerous than that customarily in use.

2. In such case plaintiff was not bound to exclude by her proofs every possible theory as to the fire's origin at variance with her own, but was required only to exclude every other reasonable theory.

Argued Sept. 26, 1917. Appeal, No. 15, Oct. T., 1917, by defendant, from judgment of C. P. Venango Co., April T., 1915, No. 33, on verdict for plaintiff, in case of S. Y. Ramage v. Producers' & Refiners' Oil Company. Before MESTREZAT, POTTER, STEWART, MOSCHISKER and FRAZER, JJ. Affirmed.

Trespass to recover damages for injury to plaintiff's lands, caused by fire.

In the case of Alice E. Ritchey v. Producers' & Refiners' Oil Company, CRISWELL, P. J., filed the following opinion, sur defendant's motion for judgment n. o. v.:

It may be conceded as settled, as stated by the learned counsel for the defendant, that in order to recover in this action the burden was on the plaintiff to prove by a preponderance of the credible evidence, first, that the defendant was negligent, and second that such negligence caused the injury complained of. On behalf of the defendant it is earnestly contended that the plaintiff has not met these requirements. If on these questions there was evidence proper for the consideration of the jury the defendant's motion should not be granted.

It may further be conceded as settled that the ground of liability is not danger but negligence, and that the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. On the question of negligence it is not seen how the court could have properly controlled the event of the suit by giving

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Opinion of Court below.

to the jury binding instructions. Instead of there being no evidence to sustain the plaintiff's contention in reference to this phase of the case, as the same is understood, it strongly preponderated over that of the defendant. It is true that in some respects the situation was peculiar. According to the testimony of Mr. Richards ninety-five per cent. of the pumping powers used throughout the oil producing territory in which the plaintiff's property was located were owned by the National Transit Company, and the gas engines and powers used by it were operated by the magneto instead of the hot tube method, by reason of its greater safety and the danger attending the use of the latter method. In the remaining five per cent. the evidence indicates the very general use of the magneto method for the like reason, and, because of its attendant dangers, the occasional use only of the hot tube method, such occasional uses being limited to times when the power was not being applied to the propulsion of oils through the lines or when low pressure only was required.

Neither on principle nor authority is it understood that the National Transit pumps should be excluded from consideration in determining what the general usage at the time of the loss was. Excluding these, however, and regarding only the testimony relating to other users of such machinery the case would still appear to be for the jury. The generally recognized and practically admitted dangers attending the use of the hot tube method of ignition, in powers used in pumping oils, in immediate connection with the gaseous and dangerous fluid, were proper for consideration, and the evidence relating thereto, instead of establishing the general use of such method, tended to establish only an occasional and exceptional use of it.

As to the evidence relating to the origin of the fire there was on the part of all a conceded liability to the escape of oil and gas in and around a power such as that destroyed, especially when the same was under strain

Opinion of Court below—Assignment of Errors. [259 Pa. by forcing oil up to or over a considerable elevation. That such oil and gas coming in contact with an open flame, such as is used in the hot tube method of ignition, would ordinarily produce an explosion and fire is so manifest as not to require proof. But notwithstanding the presence of these potential conditions favoring and accounting for the fire, it is suggested that the escaping oil or gas might have become ignited otherwise and, without any proof of facts to aid them, various theories are advanced as to the possible origin of the fire. The plaintiff was not bound to exclude by her proofs every possible theory as to its origin at variance with her own. She was required only to exclude every reasonable theory. Her theory is based upon the favoring facts and conditions indicated and the fact of the presence of fire in the midst of such conditions maintained by the defendant. The other theories are based upon the same conditions minus the essential agency of an existing fire, and to supply this it was suggested that someone when at or near the pump might have thrown down a burning match, or that the exhaust pipe of the engine might have become so heated as to ignite inflammable material in contact therewith. These theories involve and require the assumption without proof of several facts not essential to that relied on by the plaintiff and a degree of credulity only could attach to them of like importance. The conclusion is therefore reached that as to the origin of the fire the plaintiff's evidence made out a case for the jury and the court cannot summarily determine otherwise.

Verdict for plaintiff for \$1,536.71 and judgment thereon. Defendant appealed.

Errors assigned were in refusing to direct a verdict for defendant and in refusing to enter judgment for defendant n. o. v.

John W. Dunkle, with him *A. R. & N. F. Osmer*, for appellant.

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Wm. M. Parker, with him W. J. Breene, E. C. Breene
and J. D. Traæ, for appellee.

PER CURIAM, January 7, 1918:

This and two other cases in which the losses grew out of the same fire were tried together, resulting in a verdict and judgment for the plaintiff in the respective cases. One Alice E. Ritchey also brought an action and recovered a judgment against the same defendant for losses caused by the same fire in which the testimony, in so far as the same relates to the cause and origin of the fire and the alleged negligence of the defendant, was substantially the same as that produced in the other cases. The legal questions in all the cases were the same.

The two assignments filed in the present case alleged the court erred in not affirming the defendant's first point that under the law and evidence the plaintiff was not entitled to recover, and in not entering judgment for the defendant non obstante veredicto.

The learned trial judge submitted the case to the jury in a charge exceptionally clear and entirely adequate both as to the law and the facts and to which error is not assigned. For the reasons given in the opinion filed in the Ritchey case refusing the motion for judgment for the defendant non obstante veredicto, the learned judge made a like order in the present case, and on that opinion this judgment is affirmed.

Bell's Petition.

Real property—Ejectment—Rule to bring ejectment—Party in possession—Jurisdictional facts—Evidence—Title—Will—Possession—Payment of rent—Act of June 10, 1893, P. L. 415.

1. A proceeding under the Act of June 10, 1893, P. L. 415, by a party in possession of land to have an issue framed to determine title as against other claimants must comply with the provisions of the statute before a rule will be granted or an issue allowed. The

jurisdictional facts required by the act must be averred in the petition, and relief will be granted if "it shall appear to the court that the facts set forth in the petition are true."

2. Prior to the Act of 1893 conferring jurisdiction at law, a suitor was required to seek relief by a bill quia timet filed on the equity side of the court and thereby invoke the aid of a chancellor to remove a cloud resting upon his title to the land. A party may now avail himself of either the legal or equitable remedy.

3. In proceedings under the Act of June 10, 1893, P. L. 415, for the framing of an issue between the petitioner and the respondents to settle their respective rights in and to a two-acre lot of ground, where it appeared that petitioner occupied a house on a part of the premises and where there was nothing to show that there had been any division of the lot or that any other person was in adverse possession of the rest of the lot, the petitioner had such possession as to entitle her to invoke the aid of the act for the ascertainment of her rights.

4. In such case it was error to admit in evidence a will purporting to devise a part of the land to respondents, as the question for determination was not whether respondents had title to the premises, but whether petitioner had possession thereof, with disputed claim of title, and the fact that petitioner had offered some evidence of her title did not warrant respondents in offering evidence of their title.

5. The fact that the tenants occupying another house on the lot had paid rent to one of the respondents, was not admissible in evidence for the purpose of showing actual adverse possession in her, as she must first establish that the rent was properly payable to her as owner of the part of the lots claimed by her, and this could only be done by showing that she had title to the premises, evidence of which was not admissible.

Argued Sept. 26, 1917. Appeal, No. 128, Oct. T., 1917, by petitioner, from order of C. P. Venango Co., Aug. T., 1916, No. 55, dismissing petition for rule to show cause why an issue in ejectment should not be framed, in re Petition of Mazie E. Bell, for rule on Margaret Rollo, Widow, and John M. Sykes and Robert F. Glenn, Executors of Charles A. Rollo, deceased, to show cause why an issue should not be framed in ejectment. Before MES-
TREZAT, POTTER, STEWART, MOSCHIZSKER and FRAZER,
JJ. Reversed.

Petition for rule to show cause why an issue in eject-

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ment should not be framed to determine title to land.
Before CRISWELL, J.

The opinion of the Supreme Court states the facts.

The court dismissed the petition. Petitioner appealed.

Errors assigned were rulings on evidence and in dismissing the petition.

Quincy D. Hastings, for appellant.—The petitioner was in possession of the real estate, and was therefore entitled to the issue, and the validity or invalidity of the respondent's alleged title was not material: *Titus v. Bindley*, 210 Pa. 121; *Mildren v. Nye*, 240 Pa. 78.

John L. Nesbit, with him *Robert F. Glenn*, for appellees.—Petitioner was not in actual possession of the land in dispute.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

This is the petition of Mazie E. Bell under the Act of June 10, 1893, P. L. 415, praying for a rule to show cause why an issue shall not be framed between the petitioner and the respondents to settle and determine their respective rights and title in and to a lot of ground containing about two acres in the third ward of the City of Franklin, Venango County, Pennsylvania.

The petition alleges that the petitioner is the child and heir by adoption of Ella K. Rollo, deceased, who died intestate in 1905 leaving a husband, Charles A. Rollo, and no children besides the petitioner; that Charles A. Rollo died May 20, 1916; that Ella K. Rollo at the time of her death was in possession as owner of and had title in fee to said lot of ground; that petitioner and Ella K. Rollo had been in possession of said land since 1878 and petitioner has the legal title by operation of the law of descents and adoption, and has had the right of possession since the death of Charles A. Rollo, who was life

tenant by the curtesy, and since his death petitioner has been in possession of the land; and that the respondents, Margaret Rollo, second wife and widow of Charles A. Rollo, and the executors of Charles A. Rollo, deny petitioner's title and right of possession to said land.

The answer denies that petitioner is the child and heir by adoption of Ella K. Rollo, and avers that, while the legal title to the land was in Ella K. Rollo, she held it as trustee for her husband, to whom the collateral heirs of Ella K. Rollo, recognizing his rights, conveyed the title; denies that Ella K. Rollo ever had any possession save that had by her husband; denies that petitioner ever was in possession of any part of the premises except a part devised to her by Charles A. Rollo, or had any right of possession of any other part; and alleges that the respondents have had exclusive possession of that part ever since Charles A. Rollo's death.

It appears from the testimony that there were several dwelling houses and a greenhouse on the lot of ground in question. During the lifetime of Charles A. Rollo, he had control of the property and collected the rents, though he did not live on the land. The petitioner with her husband lived in one apartment of a three-apartment house on the land during the lifetime of Charles A. Rollo and has continued to live there since his death. Neither of the respondents live or have lived on the land. The petitioner testified that on June 28, 1916, shortly after Rollo's death, she notified the tenants in the other houses to pay rent to her. Since Mr. Rollo's death, the other tenants of the apartment house have paid rent to the petitioner, but, notwithstanding the notices given by her, the tenants on the other part of the land have paid rent to Mrs. Rollo, the widow, and one of the respondents. When this proceeding was instituted, about six weeks after Mr. Rollo's death, there had been no change in the tenants and no effort by any one to oust any of them. It appears that the water for all the houses on the tract was procured from wells thereon, and that, since Mr.

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Rollo's death, the petitioner has paid rent for water for the apartment house which is supplied from tanks on other property, although the wells are on the lot in question.

At the hearing respondents put in evidence, against the objection of the petitioner, the will of Charles A. Rollo. It devises to the petitioner the three-apartment house with a lot extending five feet on each side of the house and one hundred and fifty feet deep, being a part of the lot in controversy. The residuary estate is devised to the widow, Margaret Rollo, with a devise over in case of her death before that of the testator. The lot was not divided during the lifetime of Mr. Rollo.

The Common Pleas discharged the rule to show cause why an issue should not be framed, and dismissed the petition on the ground "that the petitioner has not such possession of the lands described in the petition, concerning which there is any dispute between her and the respondents, as the statute contemplates as requisite in order to give the court jurisdiction under the Act of 1893." The court below was of opinion that the petitioner was in possession only of that part of the premises known as the three-apartment house lot, as to which respondents do not deny her title under the will of Mr. Rollo, and that as to the residue of the lot in question her remedy was by a suit in ejectment. The petitioner has appealed, assigning for error (a) the entire opinion and judgment of the court, and (b) the admission in evidence of the will of Charles A. Rollo.

The contention of the appellant is that she has possession of the entire lot including the part claimed by Mrs. Rollo; that she lives on it and the tenants in the other houses are her tenants by virtue of the title set forth in the petition; that respondents' claim is to a constructive possession based on the theory that Mr. Rollo owned the land and devised it to them, which gave them possession; that such claim can be sustained only by going into the question of respondents' title, which is not permissible

in this proceeding; that it was, therefore, error to admit the will in evidence, and the fact that the tenants wrongfully paid rent to Mrs. Rollo cannot give her possession or destroy the possession of the appellant.

The position of the appellees is that the will divided the lot, that appellant took possession only of the part devised to her and does not reside on the part of the lot which the appellees claim, that Mrs. Rollo has had possession of that part of the lot since her husband's death, and that inquiry into appellant's title cannot be made in this proceeding. The appellees concede that appellant is living on the part of the lot occupied by the apartment house to which they do not dispute her title, and claim that, as to the residue of the lot, her remedy, if any, is by an action of trespass or ejectment.

Section 2 of the Act of 1893, under which the proceeding was instituted, provides as follows: "When any person or persons, natural or artificial, shall be in possession of any lands or tenements in this Commonwealth, claiming to hold or own possession of the same by any right or title whatsoever, which right or title or right of possession shall be disputed or denied by any person or persons as aforesaid, it shall be lawful for any such person to apply by bill or petition to the Court of Common Pleas of the county where such land is situate, setting forth the facts of such claim of title and the right of possession and the denial thereof by the person or persons therein named, and thereupon the said court shall grant a rule upon such person or persons, so denying such right, title or right of possession, to appear at a time to be therein named and show cause why an issue shall not be framed in said court, between the parties, to settle and determine their respective rights and title in and to said lands."

This is not a proceeding recognized by the common law, but is authorized solely by legislative enactment. Prior to the legislation conferring jurisdiction at law, a suitor was required to seek relief by a bill quia timet

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filed on the equity side of the court and thereby invoke the aid of a chancellor to remove a cloud resting upon his title to the land. A party may now avail himself of either the legal or equitable remedy: *Hutchinson v. Dennis*, 217 Pa. 290. The present proceeding being statutory, it follows that the provisions of the statute must be complied with before the rule is granted or an issue is awarded. The jurisdictional facts, required by the act, must be averred in the petition and relief will then be granted if "it shall appear to the court that the facts set forth in the petition are true."

A party may invoke the aid of the Act of 1893 if he is "in possession of any lands or tenements in this Commonwealth, claiming to hold or own possession of the same by any right or title whatsoever which right or title or right of possession shall be disputed or denied by any person or persons." These facts are jurisdictional and must be averred in the petition and established to the satisfaction of the court before a party is entitled to an issue to determine the right or title of the parties to the land in dispute. This has been determined in many cases, among which may be noted *Titus v. Bindley*, 210 Pa. 121; *Fearl v. Johnstown*, 216 Pa. 205; *Heppenstall v. Leng*, 217 Pa. 491; *Putt v. Africa*, 232 Pa. 182; *Earhart v. Marshall*, 233 Pa. 365; *McCormick v. Berkey*, 238 Pa. 264, and *Mildren v. Nye*, 240 Pa. 72.

The jurisdictional fact at issue in the present case is whether the petitioner, the appellant here, is, within the meaning of the statute, in possession of the lot in controversy. The court was of opinion that the petitioner did not have "such possession.....as the statute contemplates," and discharged the rule for the issue. With this conclusion we do not agree. We have stated substantially the pleadings and the contention of the parties. The learned court was in error, we think, in admitting in evidence the will of Charles A. Rollo. As has been pointed out, the single issue for determination in the proceeding was the possession and not the title or

ownership of the land in controversy. Whether Mrs. Bell, the petitioner, or Mr. Rollo and since his death his devisee, Mrs. Rollo, has the title to the premises is entirely outside the issue, and evidence to establish the title of either of the parties was immaterial, and, when offered, should not have been admitted. It is true, both the petition and answer claim title in the respective parties, which is required by the statute, but proof of title in either is not required nor permissible in determining the issue in this proceeding. So far, therefore, as the learned court admitted such proof by either party, it was error, and the proof cannot be considered in determining the petitioner's right to the issue.

The petitioner averred that she was in possession and owner in fee of the entire lot of ground, and set forth how she acquired title. The answer averred that Charles A. Rollo owned in fee and had possession of the whole lot at the time of his death, that he devised the lot to his widow, except the part occupied by the three-apartment house "of which said part, the said Mazie E. Bell has had sole and exclusive possession since the death of said Charles A. Rollo." It is therefore admitted by the appellees that appellant has had actual possession of a part of the lot in question since May 20, 1916, when Charles A. Rollo died. The petition avers, what is not and could not well be denied in the answer, that, as the act provides, the appellant has claimed to have not only the possession but the title to the whole lot. It is wholly immaterial whether she claimed title or right of possession as the adopted daughter of Ella K. Rollo who had the legal title when she died intestate, or from any other source. The jurisdictional fact required to be averred is that petitioner is "claiming to hold or own possession of the same by any right or title whatsoever," which is disputed. The validity of the title is not involved in the issue. What, therefore, is the effect of the admission in the appellees' answer that the legal title to the entire lot was in Ella K. Rollo when she died in 1906 and that appellant

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is and has been since Charles A. Rollo's death in actual possession of a part of the lot to which she claims title and right of possession to the whole premises? The evidence shows that no division of the lot was made in the lifetime of Mr. Rollo. It was held and used by him as one property, and continues to be such unless it was divided by Mr. Rollo's will, upon which the appellees rely to make the division. But obviously this cannot be the effect of the will if Rollo was simply tenant by the curtesy, as his title died with him, and he could not devise the premises or any part of them. Whether he had the equitable title to the premises, as contended by the appellees, and, therefore, could devise the lot involves the question of title, which, as already shown, cannot be inquired into or determined in this proceeding. The position of the parties, so far as affects the right of the appellant to the issue, is precisely the same as if Rollo had devised the whole instead of only a part of the lot to his widow, and appellant is, and was prior to Rollo's death, as now conceded, in actual possession of a part and claiming the whole property. In other words, Rollo's will cannot affect the right to the issue in either instance and must be eliminated from the case.

If, as we hold, the will has no place in the case and the property remains undivided, the actual possession of a part of the premises, claiming the whole, draws with it, under the pleadings and the circumstances disclosed by the competent evidence, within the purview of the Act of 1893, the possession of the entire tract and justifies the granting of the issue. The statute does not prescribe the kind or character of possession that petitioner must have to confer jurisdiction on the court to award an issue, but provides simply that he must be in possession of the premises, with disputed claim of title. It is contended, however, that Mrs. Rollo is in possession of the part of the lot claimed by her, and that since her husband's death the tenants under Rollo attorned to her and have since accounted to her for the rents. It is admitted that she does

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not reside on the premises in dispute. The conduct of the tenants cannot avail Mrs. Rollo or the other respondents. The only possession they can have is such as would follow and be incident to the ownership of the land in dispute acquired by Rollo's will, but, as observed above, the title to the premises cannot be inquired into in this proceeding for any purpose, and the will was not admissible to show title in Mrs. Rollo for any purpose germane to the issue before the court. The court was apparently of this opinion, but admitted the will because the petitioner had offered "some evidence of her title or the basis of it." The petitioner may show how she claims title or the right of possession, but, as indicated above, evidence on her part to establish her title was not admissible for that purpose, and, if offered, should have been excluded. That it was erroneously admitted was no justification for permitting the respondents to show their title.

The payment of rent to Mrs. Rollo by some of the tenants was not admissible to show actual adverse possession in her as she must first establish that the rent was properly payable to her as owner of the part of the lot claimed by her: *Rankin v. Tenbrook*, 5 Watts 386; *Sheaffer v. Eakman*, 56 Pa. 144; and this could only be done by showing that she had title to the premises. This she could not be permitted to do.

The order of the court below dismissing the petition for an issue is reversed, and the court is directed to grant the prayer of the petition and award an issue as therein prayed for.

Chabot v. Pittsburgh Plate Glass Company, Appellant.

Negligence—Master and servant—Safe place to work—Proximate cause—Minors under sixteen—Employment—Factory Act of April 29, 1909, P. L. 283—Violation—Duplicate lists—Posting of lists—Burden of proof—Exception.

1. In an action against a glass manufacturing company to recover for personal injuries sustained by an employee, where it ap-

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peared that plaintiff was engaged in hauling glass plates to the cutter on a small truck and placing the glass in racks behind the cutter's table; that while plaintiff was removing a plate from the truck he collided with the cutter, a fellow workman, causing the plate to fall and injure plaintiff's foot; that there was a space of only three and one-half feet between the rack and the cutter's table; that such space was insufficient for both plaintiff and the cutter to work in, and the insufficiency of the space was the cause of plaintiff's collision with the cutter, there was sufficient evidence that defendant had not provided plaintiff with a reasonably safe place in which to work and a verdict for the plaintiff will be sustained.

2. The provision of the Factory Act of April 29, 1909, P. L. 283, requiring the keeping and posting of lists of minors, is mandatory and not merely directory. Where a minor under the age of sixteen years is employed in a factory and is injured, the burden is upon the employer, in an action for such injuries, to show that in employing such minor it brought itself within the exceptions to the express provisions of the statute, prohibiting the employment of minors of this age in its factory, and if it fails to meet this burden the law refers the injury sustained by the employee to the criminal wrong of the employer as its proximate cause.

3. Where in such case it appeared that plaintiff was a minor under the age of sixteen years and that defendant had violated the Factory Act of April 29, 1909, P. L. 283, in failing to keep two lists of minors under such age employed in the establishment, and in failing to post one list in the department in which plaintiff worked, the defendant was guilty of negligence and such negligence was in law the proximate cause of the accident and a verdict and judgment for plaintiff were sustained.

Argued Sept. 26, 1917. Appeals, Nos. 5 and 6, Oct. T., 1917, by defendant, from judgment of C. P. Armstrong Co., Dec. T., 1915, No. 189, on verdicts for plaintiffs, in case of Frederick Chabot and Paul Chabot by his father and next friend, Frederick Chabot, v. Pittsburgh Plate Glass Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and FRAZER, JJ. Affirmed.

Trespass to recover damages for personal injuries.
Before KING, P. J.

The opinion of the Supreme Court states the facts.

Verdict for plaintiff, Frederick Chabot, for \$741.51,

Assignment of Errors—Opinion of the Court. [259 Pa. and for plaintiff, Paul Chabot, for \$4,258.49 and judgments thereon. Defendant appealed.

Errors assigned were in refusing to direct a verdict for defendant and in refusing to enter judgment for defendant n. o. v.

Wm. S. Dalzell, of Dalzell, Fisher & Hawkins, with him *R. L. Ralston*, for appellants.—The defendant was not guilty of negligence: *Miller v. American Bridge Co.*, 216 Pa. 559; *Coleman v. Keenan*, 223 Pa. 29; *Wilson v. Brown*, 222 Pa. 364; *Iams v. Glass Co.*, 251 Pa. 439.

Harry C. Golden, with him *E. O. Golden*, for appellees.—No list of minors in the employ of the defendant was kept on file, as required by Section 7 of the Act of April 29, 1909, P. L. 283. The defendant is, therefore, liable for injuries to the minor: *Krutlies v. Bulls Head Coal Co.*, 249 Pa. 162.

When the employment of a minor is shown to be illegal there is evidence of negligence, and if the injury complained of occur in the course of the minor's services under such unlawful circumstances, the law will refer the injury to the original wrong for its proximate cause: *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348; *Syneszewski v. Schmidt*, 153 Mich. 438; *Krutlies v. Bulls Head Coal Co.*, 249 Pa. 162; *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. 617; *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. 311; *Sullivan v. Hanover Cordage Co.*, 222 Pa. 40; *McElhone v. Philadelphia Quartette Club*, 53 Pa. Superior Ct. 262.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

This judgment is so clearly right, as demonstrated by the learned trial judge in his opinion refusing a new trial and judgment non obstante veredicto for defendant, that no extended discussion of the questions at issue is necessary. The action was brought by an employee against

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his employer to recover damages for injuries which the former alleged he sustained by reason of the latter's negligence. The negligence averred was the failure to furnish the plaintiff a reasonably safe place to perform the service for which he was employed, and that defendant engaged the plaintiff to do work for which a boy of his age, fourteen years, should not have been employed. It appears that the plaintiff was employed in defendant company's glass plant at Ford City, and his work consisted in hauling plates of polished glass from the wash-house to the cutters' department on a small truck and placing the glass in racks immediately behind and near the cutters' table. On the day of the accident and while the plaintiff was removing a plate of glass from the truck, he collided with the cutter by reason of an alleged lack of space where they had to do their work, which caused the plate of glass in the hands of the plaintiff to fall, striking the latter's foot and injuring it. The learned counsel for appellant contend that there was ample room between the cutters' table and the rack within which the plaintiff and the cutter could move in perfect safety and the plaintiff could perform the work required, and that the proximate cause of the plaintiff's injuries was a pure accident resulting from a collision between the two employees moving about in the ordinary pursuit of their duties. The evidence was sufficient to justify submitting the question to the jury, and in doing so the learned trial judge said: "Now the plaintiffs contend that this space of three and a half feet between the rack and the cutters' table was insufficient in size and room for Paul Chabot to do his work, the work that he was engaged to do and which he was to do. That because it was so narrow, the collision occurred between him and Mr. Mause while they were both engaged in doing their respective work there, and that therefore this place, where it was necessary for both Paul Chabot and Mr. Mause to work in the performance of their duty, was not a reasonably safe place for Paul Chabot to do his

work, and that by reason thereof an injury resulted to him, and that this failure of the defendant to provide and furnish at this place a reasonably safe place for him to do his work, was negligence on the part of the defendant company, and that this negligence of the company was the sole and proximate cause of the injury. I say to you, gentlemen, that that is the claim and allegation and contention of the plaintiffs in this case. When we speak of the proximate cause we mean by that term that the injury must be the natural and probable consequence of the alleged negligence—such a consequence, as under the circumstances of the case, might and ought to have been foreseen as likely to occur, by ordinarily careful and prudent persons and by ordinarily careful companies. Therefore, gentlemen, this is an important question of fact in this case for you to determine under the evidence, namely, did this defendant company fail to provide a reasonably safe place for its employee, Paul Chabot, to work and do his work—the usual and ordinary work that he was employed and directed to do by the company.” The jury returned a special finding “that the defendant company was guilty of negligence in not providing Paul Chabot a reasonably safe place to work.”

The second question raised by the defendant company is whether it was guilty of such a breach of the Act of April 29, 1909, P. L. 283, as to convict it of negligence as a matter of law. The court below so held and in this conclusion we concur. Section 1 of the act prohibits the employment of any minor under the age of eighteen years in any factory, except under certain conditions specified in the act. Section 7 forbids the employment of a minor under sixteen unless the employer procures and keeps on file, and accessible to the deputy factory inspectors, an employment certificate, as therein provided, issued to the minor, “and keeps two lists of all minors under the age of sixteen years employed in or for his or her establishment; one of said lists to be kept on file in the office of the employer, and one to be conspicuously

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posted in each of the several departments in or for which minors are employed." It is conceded that the two lists of minors employed in the factory were not kept and that one list was not posted in the department in which the plaintiff worked. It is, therefore, clear that this provision of the Act of 1909 was violated by the defendant company. It is contended, however, that the employment is legal when the employment certificate has been procured, and that the filing of the certificate and the keeping and posting of the lists of minors is simply directory. There is nothing in the act nor any reasonable construction of it that will support the contention. The language of this section of the statute is mandatory and, whatever the purpose may have been, it is clear that the legislative intent was that the posting of the lists of minors in the several departments of the work is as imperative as any other mandate of the statute. The burden was upon the defendant company to show that in employing the plaintiff it had brought itself within the exceptions to the express provisions of the statute prohibiting the employment of minors of this age in any factory, and, having failed to meet this burden, it follows that the plaintiff was injured while employed in the defendant's factory in violation of the statute. This was a negligent act for which the defendant was liable, and, as we have uniformly ruled, the causal connection being shown, the law refers the injury sustained by the employee to the original wrong as its proximate cause. The validity of the employment certificate becomes unimportant in the view of the case taken by the court below and in which we concur.

Judgment affirmed.

**Glenn v. Kittanning Brewing Company et al.,
Appellants.**

Corporations—Directors—Fight for control—Issuance of stock—Purchase by directors present at meeting—Right of stockholders to participate in issue—Setting aside of issue—Trust—Fraud—Remedy at law—Equity—Jurisdiction—Bill in equity by stockholder—Injunction.

1. While the general rule is that a stockholder is not warranted in proceeding as an individual to redress a wrong done to the corporation, without a formal demand and refusal of the corporation to bring proper action, yet stockholders are not required, either in law or in equity, to do a vain or foolish thing, and where the wrongdoers are the majority of the board of directors, who committed the wrong complained of, it is not reasonable to suppose that a demand upon them to bring corporate action would produce results, and under such circumstances stockholders are justified in instituting proceedings in their own name, without first demanding action on the part of the corporate officers.

2. Where the question of the control of a corporation is involved, the remedy at law for damages for the improper sale of stock is inadequate, and where an averment of fraud on the part of those having management of the company appears, as against the rights or the interest of the stockholders, a court of equity has jurisdiction to inquire into the transaction and make such decree as the circumstances may warrant.

3. The directors of a corporation stand in the position of trustees for the entire body of stockholders, and while stock owned by a director is his individual property, to be dealt with as he sees fit, yet when he acts in his official position he is acting not merely as an individual but as representative of others and is prohibited from taking advantage of his position for his personal profit or benefit to the detriment of the stockholders whom he represents.

4. The directors of a corporation are bound to give stockholders notice of a new issue of stock and an opportunity to subscribe for the stock in proportion to their present holdings, although such issue may be long after the business of the corporation was begun; and where the directors fail to give such notice, but purchase the stock themselves for the purpose of gaining control of the corporation, the issue may be set aside at the instance of a stockholder.

5. In a suit in equity brought by a stockholder of a brewing company on behalf of himself and other stockholders who might

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Syllabus—Assignment of Errors.

join, praying for a declaration that a certain stock certificate issued to a director of the company was invalid, it appeared that the stockholders and directors had been split into two factions, and that a majority of the board of directors owned and controlled only a minority of the stock while the other directors owned or controlled the majority. At a meeting of the board attended by the directors in sympathy with the minority interests, an issue of 250 shares of treasury stock was authorized, in pursuance of which the fifty shares in question were issued to one of the directors present, which gave the directors voting for the issue control of a majority of the stock. No opportunity was given the other stockholders, including the plaintiff, to take up any part of the new issue. Defendants contended that the stock was issued to put the corporation in funds to pay a note which the company had endorsed. There were other assets available for payment of the note. *Held*, (1) the finding that the issue was for the purpose of gaining control of the corporation was amply supported by the evidence; (2) even had there been sufficient reason for the issuance of the new stock, the directors had no right to subscribe therefor without first notifying the stockholders and giving them an opportunity to take up the stock in proportion to their present holdings; (3) under the circumstances, the fact that no previous demand was made by the plaintiffs on the corporation to take action in the matter is immaterial, and (4) the decree granting the relief prayed for was properly entered.

Argued Sept. 26, 1917. Appeals, Nos. 28, 29 and 30, Oct. T., 1917, by defendants, from decree of C. P. Armstrong Co., Sept. T., 1916, No. 203, awarding an injunction, in case of Joseph W. Glenn et al. v. The Kittanning Brewing Company, a corporation under the laws of Pennsylvania, George W. Reese, F. B. Stage and Dr. S. A. S. Jessop. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and FRAZER, JJ. Affirmed.

Bill in equity for an injunction. Before KING, P. J. The opinion of the Supreme Court states the facts.

The court on final hearing awarded an injunction as prayed for. Defendants appealed.

Errors assigned were in dismissing exceptions to various findings of fact and conclusions of law, and the decree of the court.

Harry C. Golden, with him *John E. Malone*, *Bernard J. Myers* and *J. H. Painter*, for appellants.—The plaintiffs have an adequate remedy at law. The stock which was issued was not a new issue, but part of the original stock. If the stock has been sold for less than the fair value, the plaintiff's remedy is by suit at law for damages or in equity for an accounting for profits made on the stock: *Reese v. The Bank of Montgomery Co.*, 31 Pa. 78; *Bank of Montgomery v. Reese*, 26 Pa. 143; *Curry v. Scott*, 54 Pa. 270; *Shellenberger v. Patterson*, 168 Pa. 30; *Strickler v. McElroy*, 45 Pa. Superior Ct. 165; *Provident Trust Co. v. Geyer*, 248 Pa. 423; *Hechelman v. Geyer*, 248 Pa. 430; *Hechelman v. Geyer*, 252 Pa. 123; *Monongahela Valley Brewing Co. v. Beedle et al.*, 63 P. L. J. 783.

The directors unquestionably have a legal right to sell, or authorize the sale of, unissued stock: *Reese v. Bank of Montgomery Co.*, 31 Pa. 78; *Curry v. Scott*, 54 Pa. 270; *Shellenberger v. Patterson*, 168 Pa. 30.

A desire or attempt to gain control of the corporation, and of the corporate election, is not, in itself, unlawful: *Hughes v. Citizens' E. L., H. & P. Co.*, 226 Pa. 95; *Gallagher v. McAdams*, 49 Pa. Superior Ct. 81.

The plaintiffs have no standing to maintain this action; the right if it exists is in the corporation and the plaintiffs have shown no demand upon the corporation or refusal upon the part of the corporation to act: *Law v. Fuller*, 217 Pa. 439; *Pellio v. Bulls Head Coal Co.*, 231 Pa. 157; *Wolf v. Penna. R. R. Company*, 195 Pa. 91.

John W. Reed, with him *R. L. Ralston*, for appellee.—When the capital stock of a corporation is increased by the issue of new shares, each holder of the original stock has the right to offer to subscribe for and demand from the corporation such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase: *Strickler v. McElroy*, 45 Pa. Superior Ct. 165; *Morris v. Stevens*,

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178 Pa. 563; *Electric Co. of America v. Edison Electric Illuminating Co.*, 200 Pa. 516.

A dissenting stockholder may cause to be set aside a sale of unissued stock to other stockholders at a grossly inadequate price to enable them to obtain control: *Essex v. Essex*, 141 Mich. 200; *Trask v. Chase*, 107 Me. 137; *Luther v. Luther Co.*, 118 Wis. 112; *Arkansas Society v. Eichholtz*, 45 Kan. 164; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Way v. American Grease Co.*, 60 N. J. Eq. 263; *Humboldt Driving Park Assn. v. Stevens*, 34 Neb. 528; *Whitaker v. Kilby*, 55 N. Y. Misc. Rep. 337; *Schmidt v. Pritchard*, 135 Iowa 240.

A court of equity has jurisdiction to control the issue of any stock in violation of the pro rata rule: *Snelling v. Richard*, 166 Fed. Repr. 635.

It was not necessary that a demand for redress should first have been made upon the defendant: *Commonwealth Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410; *Treat v. Penna. Mutual Life Insurance Co.*, 203 Pa. 21.

OPINION BY MR. JUSTICE FRAZER, January 7, 1918:

Defendants have appealed from a decree entered conformably to a bill in equity brought by Joseph W. Glenn as a stockholder of the Kittanning Brewing Company on behalf of himself and other stockholders joining therein asking the court to declare illegal and invalid a certificate for fifty shares of the capital stock of the corporation issued to F. B. Stage, one of the defendants, and a member of the company's board of directors, and for an order that such certificate be surrendered to the company for cancellation and Stage enjoined from voting the stock or making transfer thereof. A preliminary injunction was subsequently made perpetual and a decree entered in accordance with the prayers of the bill.

The main facts upon which the disposition of the case depends are not in dispute. The board of directors of the brewing company was composed of five members consisting of the original plaintiff Glenn, Harry G. Luker,

who intervened with others as plaintiffs, and the three defendants. The capital stock of the company consisted of one thousand shares of the par value of \$100 each, of which seven hundred and fifty had been issued. The company carried on its business successfully for approximately ten years, gradually increasing its plant and equipment and accumulating a surplus until July, 1916, when the book value of its outstanding stock was \$322.79 per share. In the meantime, by reason of differences among the stockholders, two factions had arisen. Plaintiff Glenn and Luker, two of the board of directors, represented one faction and the defendants Reese, Stage and Jessop, the remaining members and the majority of the board, the other. Plaintiffs faction though a minority of the board, owned or controlled a majority of the stock, consisting of 381 of the 750 shares outstanding; 359 shares were controlled by defendant faction and the remaining ten shares were in the hands of neutral parties. On July 7, 1916, at a regular meeting of the board of directors, attended by the three defendants only, a resolution was adopted authorizing the manager, Stage, "to sell any portion of the 250 shares of the treasury stock at a price not less than par, one hundred dollars per share, for the purpose of paying off the indebtedness of the company." Notice of this meeting was not required to be given the directors, the court however found the secretary made an honest effort to notify the absent members by telephone, and that such notice was actually received by Glenn.

Agreeably to the resolution, and within a week after the meeting, fifty shares of the company's stock were issued to Stage at par. These shares gave defendants the control of the company. Defendants give as reason for the issuing of the additional stock, a demand by the Safe Deposit & Title Guaranty Company for payment of a demand note of the brewing company for six thousand dollars held by the guaranty company.

The findings of the court below, and the testimony in

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the case, show the brewing company intended to become endorser on the note of one McGregor for six thousand dollars to enable the latter to purchase a hotel property. The McGregor note was to be discounted by the guaranty company and its president had informed the brewing company that before such endorsement would be accepted the six thousand dollar demand note must be paid. No other demand was made for payment of the note. As a matter of fact, the trust company held, as collateral, bonds of the brewing company to the extent of eight thousand dollars and the brewing company also held in its treasury an additional number of its corporate bonds acceptable as collateral, and available for the purpose of raising funds for any legitimate purpose required by the company. The brewing company was under no obligation to become surety on the proposed loan, and did so merely as a matter of business policy, with a view to procure a new customer for its products. No opportunity was given other stockholders to subscribe proportionately for the purchase of the fifty shares of the stock issued, and they were without knowledge of the transaction until more than a month after the issue had been made. No reason on account of financial conditions of the company was apparent for issuing the additional stock and the court found the real purpose of the transaction was to place the control of the company in the hands of the faction represented by the defendants, and in its opinion stated as follows: "While ostensibly, the purpose in selling the said fifty shares of the unissued capital as aforesaid to Stage, was, as defendants contend, to pay the \$6,000 note of the company, then owing to the Safe Deposit & Title Guaranty Company, was that in truth and in fact the real purpose? The circumstances, the surroundings, the existing conditions, the factional troubles, the singleness of purpose pursued, as shown and fairly deducible from the evidence, clearly point to the conclusion that the real, underlying purpose was to obtain control of the corporation..... We

are confirmed in this view, when we see that no obligation rested upon the corporation to assist McGregor by loaning its endorsement to him, and that under all the facts in the case the loan could not be regarded as a desirable one from the standpoint of the security. Aside from said loan, there would have been no call from the bank—at least that is a fair inference from the evidence, for payment of the \$6,000 note. However, if there had been necessity to pay off said loan, why should a sale of the unissued stock be resorted to when 21,000 dollars' worth of the first mortgage bonds lay in the treasury of the company, available for sale or for collateral to obtain loans, and another \$8,000 worth then up as collateral to secure said \$6,000 note, which at once would be available upon payment of the note? It is not at all apparent that the financial condition of the company, at the time, demanded the sale of the said stock."

The findings of fact by the court below are amply supported by the testimony in the case and will therefore not be disturbed: *Myers v. Consumers' Coal Co.*, 228 Pa. 444; *Hull v. Delaware & Hudson Co.*, 255 Pa. 233. Nor does error appear in the legal conclusions on the facts found. No rule is better established than that the directors of a corporation stand in the position of trustees for the entire body of stockholders, and while stock owned by the director is his individual property to be dealt with as he sees fit in the same manner and to the same extent as other stockholders, yet, when he acts in his official position, he is acting not merely as an individual but as representative of others and is prohibited from taking advantage of his position for his personal profit or to reap personal benefit to the detriment of the stockholders whom he represents. Whenever there is an intimation that a director has violated the duty thus imposed upon him by virtue of his office, or has failed to act fairly and honestly toward those whom he represents, the law ceases to look at the mere form of the device or means employed and "pierces through

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the surface and seizes upon the evils which lie within": Tenth National Bank of Philadelphia v. Smith Construction Co., 242 Pa. 269; Hechelman v. Geyer, 248 Pa. 430.

The circumstances under which the stock in controversy was issued and purchased by one of the directors who voted for the resolution, were adequate to raise a doubt of the good faith of the directors. Assuming the resolution was proper and there was sufficient reason for issuing the stock, the directors who were present at the meeting had no right to subscribe for the new issue without first notifying all stockholders and affording them an opportunity to take up the stock in proportion to the amount of the shares already held by them. This is especially true, in view of the long standing dispute between the two factions and the attempt by both to obtain a controlling interest. The directors, as a board, had knowledge of this fact, and there were consequently particular reasons requiring them to act impartially and in the interest of the stockholders as a whole. The former were bound to give notice and afford the latter an opportunity to subscribe for the stock on equal terms and it is immaterial that such additional issue was made long after the business of the company was begun: Morris et al. v. Stevens et al., 178 Pa. 563; Electric Co. v. Electric Co., 200 Pa. 516; Cook on Corporations, Section 286.

We cannot agree with the contention that a court of equity is without jurisdiction to set aside the transaction complained of and that plaintiffs' remedy, if any, is by action at law for damages. Where the question of control of the corporation is involved, the remedy at law for damages for an improper sale of stock may be entirely inadequate, and where an averment of fraud on the part of those having management of the company appears, as against the rights and interest of the stockholders, a court of equity has jurisdiction to inquire into the transaction and make such decree as the circumstances may warrant: Electric Co. v. Electric Co., supra.

The fact that no previous demand was made by plain-

tiffs on the corporation to take action in the matter is of no importance under the facts in this case. Although the general rule is that a stockholder is not warranted in proceeding as an individual without a formal demand and refusal of the corporation to bring proper action: Commonwealth Title Insurance & Trust Co. v. Seltzer, 227 Pa. 410; yet plaintiffs are not required, either in law or equity, to do a vain or useless thing. The wrongdoers in this case were the majority of the board of directors and as they committed the wrong complained of, it is scarcely reasonable to suppose a demand upon them to bring corporate action would have produced results. Plaintiffs were therefore justified in instituting proceedings in their own name without first demanding action on the part of the corporate officers: Treat v. Pennsylvania Mutual Life Insurance Co., 203 Pa. 21.

The decree of the court below is affirmed.

Murray, Appellant, v. Smith et al.

Practice, Supreme Court—Appeals—Errors due to conduct of appellant's counsel—Assignments of error—Defective assignments.

In an action of assumpsit brought by a physician to recover compensation for professional services, where the controlling questions of fact and law were not numerous, intricate or confusing, but were made so by the conduct of counsel during the trial, and upon a review of the whole record, it appeared that, under the competent evidence submitted to the jury, there was no merit in the plaintiff's claim, a verdict for the defendant will be sustained although there might have been technical errors, resulting from the conduct of counsel at the trial, especially where the rules relating to assignments of error were violated.

Argued Sept. 26, 1917. Appeal, No. 34, Oct. T., 1917, by plaintiff, from judgment of C. P. Jefferson Co., Nov. T., 1914, No. 103, on verdict for defendants, in case of John H. Murray v. W. O. Smith, E. C. McKibben, E. W. Robinson, J. P. Wilson, S. A. Rinn, F. C. Lang, W. A.

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Sutter, H. G. Bowers, Dr. S. J. Hughes, G. C. Brown, A. B. White and Jacob L. Fisher, Executors of the Last Will and Testament of Emma M. Weber, deceased. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and FRAZER, JJ. Affirmed.

Assumpsit for medical services rendered defendants' decedent. Before SLOAN, P. J., specially presiding.

The opinion of the Supreme Court states the facts.

Verdict for defendant and judgment thereon. Plaintiff appealed.

Errors assigned were various rulings on evidence and instructions to the jury.

Raymond E. Brown, H. C. Campbell, Gillespie and Gillespie and W. B. Adams, for appellant.

John W. Reed, with him *Clark & Stewart* and *Jacob L. Fisher*, for appellee.

PER CURIAM, January 7, 1918:

It may well be admitted, as suggested in the brief of appellant's counsel, that the trial of this case was long, involved many intricate, controverted and confusing questions of law and fact, and was warmly, even bitterly contested by opposing counsel, but this admission must be accompanied by the suggestion that it was entirely owing to the manner in which the trial was conducted by counsel of both parties. The case was very simple, an action of assumpsit by a physician to recover compensation for professional services, and the controlling questions of fact and law were neither numerous, intricate, nor confusing, but were made so solely by the inexcusable conduct of the leading counsel during the trial of the case which manifestly tended to mislead rather than aid in the solution of the questions involved in the case. Of course, the court should not have permitted

such conduct, but, if it resulted injuriously to the client of either party, he is not in a position to complain.

We have reviewed this record with care, and are satisfied that under the competent evidence submitted to the jury there is no merit in the plaintiff's claim, and the jury and court reached the correct conclusion. We, therefore, should and will not be astute in searching for technical errors, made possible by the irregular and unusual manner pursued by counsel in the conduct of the trial resulting in substantial justice between the parties. The greater number and possibly all of the assignments of error are in violation of the rules of this court, and, for the reasons stated, we are not inclined to overlook such dereliction and aid the defeated party in continuing the litigation by reversing a judgment amply warranted by the evidence. We find no reversible error in the assignments considered, and, therefore, the judgment is affirmed.

Cossette, Appellant, v. Paulton Coal Mining Company.

Negligence—Master and servant—Mines and mining—Bituminous Coal Mine Act of June 9, 1911, P. L. 756—Construction of passageway—Mine foreman—Negligence of mine foreman—Constructive notice of defect—Contributory negligence—Nonsuit.

1. The rule that under the general provision of the mining acts placing the workings under the mine foreman's charge and supervision, and under certain special provisions thereof, the foreman is responsible for all work in the course of the construction of passageways, expressed with reference to prior statutes, is applicable to the Act of June 11, 1911, P. L. 756.

2. In an action against a mining company to recover for injuries sustained by an employee in consequence of the fall upon him of slate from the roof of a newly constructed passageway, a compulsory nonsuit was properly entered where it appeared that the passageway was being constructed under the supervision of the mine foreman; that his attention was called to the dangerous condition of the roof, but that it was not remedied; that no signal was placed to warn employees of the danger; that the foreman

told plaintiff and other workmen that they could use the passageway, and that the next day, while plaintiff was using it, a portion of the roof fell, causing the injuries complained of.

3. In such case had the new entry been completed a sufficient period of time before the accident to fix the defendant with constructive notice of the defect therein, or had the latter received express notice of its faulty condition, or had the way existed for such a length of time as to become part of the established plant, or had it been in use as a regular, completed passage, the defendant might have been held liable.

4. It seems plaintiff was not guilty of contributory negligence under the facts of this case.

Argued Sept. 27, 1917. Appeal, No. 153, Oct. T., 1917, by plaintiff, from final order of C. P. Armstrong Co., Sept. T., 1915, No. 99, refusing to take off nonsuit, in case of Joe Cossette v. Paulton Coal Mining Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKER and FRAZER, JJ. Affirmed.

Trespass to recover damages for personal injuries. Before KING, P. J.

The opinion of the Supreme Court states the facts.

The court entered a compulsory nonsuit, which it subsequently refused to take off.

Error assigned was in refusing to take off the nonsuit.

H. Fred Mercer, with him *C. E. Harrington* and *Walter L. Dipple*, for appellant.—The mine superintendent was derelict in the performance of the duties imposed upon him in consequence of which the plaintiff was injured, and the defendant was, therefore, liable: *McColom v. Penna. Coal Co.*, 250 Pa. 27; *Watson v. Monongahela R. C. C. & C. Co.*, 247 Pa. 469; *Wolcutt v. Erie Coal & Coke Co.*, 226 Pa. 204; *Cohn v. May*, 210 Pa. 615.

To provide a proper passageway in a bituminous coal mine for the use of employees in going to and from work is a nondelegable duty imposed upon the mine owner: *Simmons v. Lehigh Valley Coal Co.*, 240 Pa. 354.

The mine owner failed to warn the employee of the danger of the new travelingway: *Mish v. Lehigh Valley Coal Co.*, 67 Pa. Superior Ct. 27.

H. A. Heilman, with him *F. C. Jones*, for appellee.—The injuries sustained by plaintiff resulted from the negligence of the mine foreman, for which the defendant is not liable: *Durkin v. Kingston Coal Co.*, 171 Pa. 193; *Hall v. Simpson*, 203 Pa. 146; *Golden v. Mt. Jessup Coal Co.*, 225 Pa. 164; *Dempsey v. Buck Run Coal Co.*, 227 Pa. 571.

OPINION BY MR. JUSTICE MOSCHZISKE, January 7, 1918:

On December 7, 1914, the plaintiff, Joe Cossette, an employee of defendant company, was severely injured in the latter's coal mine; he sued in trespass, alleging negligence; the court below entered a nonsuit, which it subsequently refused to remove; hence this appeal.

The case is so well disposed of in the following excerpts from the opinion of the learned court below that we need add but little thereto: "A cross entry to connect the main haulage way with a face entry was in process of completion at about this time [the date of the accident] . . . ; from both ends it had been driven and constructed by miners, who as they advanced approached each other; and so the work continued until in the afternoon of December 6, 1914, when they met and knocked or cut through a small hole from two feet to three feet in size The plaintiff had not been engaged in working in the new entry, but was mining coal in another part of the mine. On the morning of the day of the injury he went to his work at 6:30 o'clock, and completed his day's work about 11 o'clock a. m., when, in company with his fellow employee, Ameliori Buffa, he started to go out of the mine. In going out they proceeded by way of this new entry, Buffa being in the lead, and having passed through the aforesaid opening or hole,

cut through the preceding day, the plaintiff, when about eight or ten feet beyond it, was caught by a fall of slate and rock from the roof and severely injured. The evidence on the part of plaintiff showed that the defendant company, at the time of the accident and prior thereto, had in its employ a certified mine foreman (Curt Snare), a superintendent (a Mr. Lace), and about 75 to 80 miners or employees. It further appears that the mine foreman, under whose supervision this new connecting entry was being constructed and driven, was at the point where the aforesaid hole was cut through, just immediately or soon thereafter, and that his attention was called, by . . . one of the miners engaged in driving said entry, to the bad condition of the roof at or near said hole. . . . He said: 'All right, I will fix it up later.' In this condition it remained that day and the next morning. When plaintiff and other employees came to go to work, they were told, by the foreman, of the cut-through, and that 'they could use that way in going in and out or back and forward, if they wished,' instead of the old way, as it would be nearer. The plaintiff, however, in going into the mine that morning, used the old way, and [later in the day] for the first time attempted to go out by using the new entry [when he was hurt]. . . . Does the plaintiff's evidence show negligence of the defendant company causing the injury complained of? If so, we were in error in directing a nonsuit. The evidence shows that the company employed both a superintendent and a certified mine foreman; that the entry wherein the injury occurred was in process of construction, but as yet not completed; that a hole had been cut through, through which men could crawl, on the afternoon of December 6th [at about 3 o'clock], and that the accident occurred about half past 11 o'clock a. m. the next day. The mine foreman, who under the Act of 1911, P. L. 756, 762, is given full charge of the inside workings and of the men working therein, knew of this cut through and the defective condition of the roof thereat; yet, notwithstanding,

he posted no danger signals and did nothing to guard and protect employees against or from the danger existing there, but permitted the employees—even suggested to plaintiff and others—that they might pass through by that way. There is an entire absence of evidence that the superintendent or owner of the mine had any knowledge or notice of the cut-through in the said entry or of the defective condition of the roof near thereto, or of the failure of the mine foreman to safeguard it; as this condition had only existed for about 20 hours, and a night having intervened before the accident happened, we cannot hold that constructive notice was brought home to the company, and the evidence would not warrant such a finding by a jury. Neither in our opinion was there sufficient evidence to submit to the jury to warrant a finding that the mine foreman was acting in a dual capacity. There is no evidence whatsoever that the defendant company had any knowledge of his [alleged] inefficiency or neglect of duties, nor is there any evidence to indicate that he did not have full and complete, exclusive control, charge and supervision of the underground or inside workings of the mine and the men or employees therein working. . . . The accident was due solely to the negligence of the mine foreman, and for his negligence, under the circumstances, the defendant company was not answerable. . . . The motion to take off the compulsory nonsuit is refused.”

We have read all the printed testimony, and find the foregoing summary substantially correct. The statement of claim alleges that defendant “delegated the immediate supervision of said mine to a superintendent”; but, as already indicated, plaintiff contended at trial that this official was frequently absent and, as a matter of fact, the mine foreman really acted in the dual capacity of foreman and superintendent. We agree with the court below, however, that the evidence relied upon to sustain this contention is entirely too vague, indefinite and inconclusive to justify a jury in so finding.

One other point calls for attention: The "old way," which, up to the time of the accident, was regularly used by plaintiff and other employees of defendant's mine, had been flooded by water for a year or more; but, while this state of affairs might have put the mine employees to a considerable inconvenience, it did not render the way impassable or imminently dangerous. Plaintiff contends that "defendant was bound to take notice of the dangerous condition of its mine, and to know that its mine foreman was violating the statute, and had not provided its employees with a reasonably safe traveling way to and from work"; but to this it may well be answered that defendant was constructing the new passageway when the accident happened. In other words, defendant was then apparently engaged in an effort to relieve the condition in question; which, considering the fact that the old passage was not in any sense imminently dangerous, did not require the company to close down its mine pending the completion of the new way. Under such conditions, it would not be contributory negligence for plaintiff to use the new, instead of the old way (*Reeder v. Lehigh Valley Coal Co.*, 231 Pa. 563, 571-2); but the nonsuit at bar was not entered on the ground of contributory negligence. The trial judge declined to submit the case to the jury because he believed there was a lack of negligence on the part of defendant company, since, under the evidence, the negligence, if any, was clearly and solely that of the mine foreman, for which, under the law as it stood at the time of plaintiff's injury, his employer was not liable.

Of course, had the new entry been fully completed a sufficient period of time before the accident to fix the defendant with constructive notice of the defect therein, or had defendant received express notice of its faulty condition, or, again, had the way existed for such a length of time as to become part of the established plant, or, further, had it been in use as a regular, completed passage, then a different case would

be presented, and defendant might be held liable; but all the evidence shows the place where plaintiff met with his injury was an entry still in course of construction, and, as recently ruled by this court, in *Watson v. Monongahela River Coal & Coke Co.*, 247 Pa. 469, 474, "Under the general provision placing the workings under the mine foreman's charge and supervision, and under certain special provisions to be found in the [Mining] Acts, he [the foreman] is responsible for all work in course of the construction of passageways." This was said with reference to prior statutes, but it is applicable with like force to the Act of June 9, 1911, P. L. 756.

Here, as properly ruled by the learned court below, the negligence, if any, was purely that of the mine foreman, for which the defendant is not liable (*Durkin v. Kingston Coal Co.*, 171 Pa. 193, 203; *Hall v. Simpson*, 203 Pa. 146, 148; *Golden v. Mt. Jessup Coal Co.*, 225 Pa. 164, 166-7; *Dempsey v. Buck Run Coal Co.*, 227 Pa. 571, 578, 579; *Reeder v. Lehigh Valley Co.*, supra, pp. 575-6; *D'Jorko v. Berwind-White Co.*, 231 Pa. 164, 169-70). The situation of this injured appellant commands our sympathy, but the law must be administered as established; and, thereunder, we cannot hold the action complained of to be error.

The judgment is affirmed.

McWilliams' Estate.

Wills—Validity—Alleged alteration—Handwriting experts—Absence of corroboration—Weight—Petition for issue d. v. n.—Refusal.

1. After direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration, but the evidence of experts, without the support of other evidence, is insufficient to attack the validity of a document.

2. Where a petition for an issue devisavit vel non alleged that the last paragraph of the will had been added thereto after the execution thereof by testator and without his knowledge or con-

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sent, but where the scrivener of the will testified that he wrote the entire will with the exception of the signature of the testator and the witnesses, in the presence of the testator and the subscribing witnesses, and where the only evidence in behalf of the contestants was that of handwriting experts, who testified that the paragraph in controversy was not in their opinion written with the same pen and ink as the other portions of the will, the court made no error in dismissing the petition.

Argued Sept. 27, 1917. Appeal, No. 19, Oct. T., 1917, by Homer McWilliams, and S. S. McWilliams and William McWilliams, Jr., from decree of O. C. Westmoreland Co., May T., 1915, No. 161, refusing an issue devisavit vel non, Estate of David McWilliams, deceased. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and FRAZER, JJ. Affirmed.

Petition for issue devisavit vel non.

COPELAND, P. J., filed the following opinion :

David McWilliams, late of Madison Borough, Westmoreland County, Pennsylvania, deceased, died testate on the 25th day of January, 1914, first having made his last will and testament in writing, dated the 24th day of May, 1912. This will, after his death, was duly probated and recorded on the 30th day of January, 1914, in Will Book 18, page 236. By this will, the testator devised and bequeathed as follows :

"1st. I will devise and bequeath that after my death all my just debts and funeral expenses be first paid by my executor out of my estate.

"2nd. I will devise and bequeath that my executors shall have a monument put to my lot in the cemetery for myself and wife to cost not less than \$150.

"3rd. I will that my executor shall put \$100.00 on interest, the interest of which shall be used for keeping my lot in the cemetery in repair.

"4th. I will devise and bequeath to my beloved wife Barbary McWilliams all the rest of my estate both real personal and mixed absolutely as her own.

"5. And lastly if my wife Barbary McWilliams should die before me then my express will and meaning is that the whole of my estate both real, personal and mixed wherever found shall go to Ida M. Ruff and Harry E. Ruff."

On the 18th day of January, 1915, H. C. McWilliams, S. S. McWilliams, William McWilliams and F. G. Cooper, nephews of the decedent, appealed to the Orphans' Court of Westmoreland County from the decision of the register of wills admitting to probate this paper writing alleged to be the last will and testament of the decedent, and from the granting of letters testamentary thereon. A bond in the sum of five hundred (\$500) dollars, at the same time, was filed by the appellants, conditioned that they pay all or any costs which may be occasioned by reason of such appeal and which may be decreed by the Orphans' Court to be paid. At the time of filing this appeal and bond, a motion was filed to strike off the appeal from the probate because it did not appear, from the appeal filed, the nature and character of appellants interest in the estate. We might say in passing—for it is not clear to us that this motion was disposed of—that the appeal shows they were nephews of the decedent and, of course, would be entitled to inherit as collateral heirs, if the decedent died intestate, he being without issue and his wife dead.

On the 28th day of June, 1915, a petition was presented to this court by the parties appealing from the decision of the register of wills admitting this writing to probate, setting forth the facts they expected to be able to prove and praying that a citation be awarded directed to all parties interested, to wit: Ida M. Ruff and Harry E. Ruff, the persons to whom, under the alleged will, the entire estate of the decedent goes, to show cause why the appeal should not be sustained and why an issue should not be awarded to try the following questions:

"First. Whether or not the fifth paragraph of the said last will and testament devising the whole of his estate,

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both real, personal and mixed, to the said Ida M. Ruff and Harry E. Ruff was procured by undue influence on the part of the said Ida M. Ruff and Harry E. Ruff and others.

"Second. Whether or not the said fifth paragraph of the said last will and testament of the said David McWilliams, deceased, is part of the said last will and testament.

"Third. Whether or not the said writing, as probated, is the last will and testament of the said David McWilliams, deceased."

The same day an order was made that a citation issue, directing all the parties named in the petition to appear and show cause why the prayer of the petitioners should not be granted. This citation was made returnable to Saturday, the 17th day of July, 1915, at 9 o'clock a. m.

In response to this citation, on the 14th day of July, the parties named therein appeared, traversed all the matters set forth in the petition, denied all the allegations therein contained, and prayed that the petition of the appellants be dismissed at their costs.

Afterwards, to wit: on the 11th day of September, 1915, a petition was filed by S. S. McWilliams, one of the administrators of the estate of Joseph McWilliams, deceased, a brother of the decedent in this case, to amend the petition for citation and issue so as to make J. Collins Greer and S. S. McWilliams, administrators of the estate of Joseph McWilliams, deceased, parties to this contest. This amendment was allowed by the court.

With the issue framed by the petition and answers, the matter came on to be heard, on the 28th day of December, 1915, when the testimony attached hereto was taken. It is from this testimony we are now to determine whether we shall award an issue to try the questions of fact prayed for in the petition of the contestants.

While it is alleged in the petition for an issue that David McWilliams was, at the time of the execution of this alleged will, weak in mind, memory and under-

standing, from sickness, extreme age, bodily weakness, infirmities and other cause, and that the fifth paragraph of this writing alleged to be his last will was procured and caused to be written by artful contrivances and undue influence, fraud and duress of Harry E. Ruff, Ida M. Ruff and others; yet this testimony fails to show—we believe not a single witness testified—that the decedent was of weak mind and without testamentary capacity, or that undue influence was exercised over him by the proponents. The only question to which it is necessary for us to direct our attention is, whether or not the fifth paragraph in this will was inserted by the scrivener after the decedent signed it. The whole contest narrows itself down to the determination of this question. To this, and this question alone, was testimony offered by the contestants of the will. It is now for us to say, from this testimony, whether that testimony is of sufficient weight and directness as would justify us in sending an issue to the Common Pleas Court for trial by jury.

Harry E. Ruff, the scrivener of the will, says that he wrote the entire will, with the exceptions of the signature of the testator and the witnesses to the will, just as it appears to-day, before David McWilliams or the subscribing witnesses signed it; that the fifth paragraph was in the will before it was executed by the decedent and witnessed by the Rogers boys; that he used a fountain pen in writing it; that it was written with one kind of ink; and that the testator and the subscribing witnesses used the same pen and the same ink in executing and witnessing it. This testimony of Mr. Ruff was elicited by the appellants as if under cross-examination. One of the subscribing witnesses, on cross-examination, said that this paper was signed and executed by David McWilliams and witnessed by himself and brother with the same pen, and that he saw no other pen that day. Outside of the experts, the contestants have produced no witnesses to prove the contrary of what was testified to by Mr. Ruff and the subscribing witnesses. There is not a

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witness produced by the contestants who says that this fifth paragraph was not in the will at the time David McWilliams signed it. There is not a witness produced by the contestants who says that this fifth paragraph was inserted by Harry E. Ruff after or immediately before Barbary McWilliams' death, without the knowledge or consent of David McWilliams, or out of his presence; and there is not a witness who says that this fifth paragraph was written with a different pen and with a different ink from that used in writing the balance of the will.

The fact that David McWilliams signed the paper, which is not denied by the contestants, is evidence that he knew the contents of this paper at the time of signing and that the fifth paragraph was there at that time. Of course, this is presumptive evidence but still it must be overcome. Then, again, the fact that these contestants, in their petition for a citation on the framing of an issue, averred undue influence on the part of Harry E. Ruff and Ida M. Ruff in procuring the execution of this fifth paragraph, is an admission that it was in the will at the time it was executed by David McWilliams. We have, in addition to all of this, the testimony of Harry E. Ruff that the fifth paragraph was written in the will before it was signed by the testator, together with his testimony and that of Daniel Rogers as to the whereabouts of the will and the envelope in which it was kept. All point conclusively that this fifth paragraph was never written in this will at the time or in the manner the contestants now contend.

Against this positive testimony we have the testimony of two experts on handwriting, namely, John H. McKlveen and George W. Wood whose testimony, when boiled down, amount to this: that there was a different pen and a different ink used in writing the fifth paragraph of this will. They do not pretend to say it was written at a different time from the writing and execution of the balance of the will, or that it was not written

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in the presence of the testator and at his direction. The inference we are expected to draw from their testimony that it was written with a different pen and ink is that this fifth paragraph was placed in the will after its execution. This we cannot do and we refuse to allow a jury to predicate a guess on that testimony alone. It is true, the scrivener said that he used but one pen and one ink in writing the entire will which is in conflict with this expert testimony, but if different pens and ink had been used, we are unable to see how it would have hurt his case to have so testified. An examination of the will, especially the signatures of the testator and that of the witnesses, show as marked a difference as to the color of the ink as there exists between the fifth paragraph and the balance of the body of the will. And so an examination and comparison of the part complained of and other parts of the will do not convince us that it would be safe to draw the conclusion desired by the contestants. This is our opinion of the evidence.

The evidence of these two experts do not corroborate any testimony on the part of the contestants and is not sufficient in itself, when taken alone, to prove that this fifth paragraph was added to this will by Harry E. Ruff after its execution by the testator. Our notion of the law is that expert testimony, such as was offered in this case, cannot be received as independent testimony to establish the facts or conclusions sought by the contestants to be established or drawn. Such testimony can only be received as corroborating other direct or positive evidence as to some fact in issue.

In *Fulton v. Hood et al.*, 34 Pa. 365, a question as to the alteration of the date in the bond was involved. The person who wrote it testified positively that no alteration was made after the signature. On the other hand the sons of the decedent, on account of whose indebtedness the bond was given, testified that the date was changed. The allegation of the defendant was that the last line of the instrument had been added after its execution and de-

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livery, and after it had been taken away by the agent of the plaintiffs. To meet this allegation, the plaintiffs were allowed to call experts, and prove by them that, in their opinion, the whole instrument, including the last line, was written by the same hand, with the same pen and ink, and at the same time. The admission of this expert testimony was the subject of an assignment of error. Mr. Justice STRONG in delivering the opinion of the court said (page 370) :

“It is to be observed, that the evidence was offered only after direct testimony had been given to prove that the bond was genuine, and that it was in the same condition as when signed by the defendant. It was admitted, not as independent, but as corroborative evidence.”

In the case of *Burkholder v. Plank*, 69 Pa. 225, we find this language at the conclusion of the opinion of Mr. Justice SHARSWOOD :

“It may be considered as well settled in this State by *Fulton v. Hood*, 34 Pa. 365, and *Travis v. Brown*, 43 Pa. 9, that after direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration.”

To the same effect we have the late cases of *Masson's Est.*, 198 Pa. 636, and *Fuller's Est.*, 222 Pa. 182.

The evidence upon the part of the contestants we think is insufficient to justify our sending an issue to the Court of Common Pleas for trial to determine whether the fifth paragraph in his will was executed, all other questions being abandoned. We would, in conscience, be constrained, if sitting as a trial judge, to set aside a verdict if found by a jury against this will and, therefore, we are of the opinion that the issue should be refused.

The court dismissed the petition. Homer McWilliams, S. S. McWilliams and William McWilliams, Jr., appealed.

Error assigned was the decree of the court.

John E. Kunkle, for appellants.

John P. Pinkerton, for appellees.

PER CURIAM, January 7, 1918:

The decree dismissing the petition for an issue devisavit vel non and sustaining the decision of the register admitting the will of David McWilliams, deceased, to probate is affirmed on the opinion of the learned judge of the Orphans' Court.

Rakie, Appellant, v. Jefferson & Clearfield Coal & Iron Company.

Workmen's compensation law—Award by Workmen's Compensation Board—Appeal to Common Pleas Court—Order remanding case to board—Erroneous order—Practice, C. P.—Practice, Supreme Court—Interlocutory order.

On appeal to the Common Pleas from a decision of the Workmen's Compensation Board, affirming the finding of a referee in favor of a claimant, the court should enter a final judgment awarding to each dependent the amount due him; and where the court remands the case to the Workmen's Compensation Board for adjustment in accordance with the court's opinion, the Supreme Court, on appeal, will remand the record to the Common Pleas with directions to enter a final judgment.

Argued Oct. 1, 1917. Appeal, No. 166, Oct. T., 1917, by plaintiff, from order of C. P. Indiana Co., June T., 1917, No. 170, remanding case to Workmen's Compensation Board, in case of *Mrs. Felix Rakie v. Jefferson & Clearfield Coal & Iron Company*. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Reversed.

Appeal from Workmen's Compensation Board. Before LANGHAM, J.

The opinion of the Supreme Court states the facts.

The court reversed the decision of the Workmen's Compensation Board, affirming the decision of the referee as to the compensation to which the dependents of the deceased were entitled, and remanded the case to the Workmen's Compensation Board for adjustment in accordance with the schedule decided upon by the court. Plaintiff appealed.

Error assigned was the order of the court.

S. J. Telford, for appellant.

Henry I. Wilson, for appellee.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

This proceeding was instituted before the Workmen's Compensation Board by Mrs. Felix Rakie to secure compensation for the death of her husband who was killed while he was in the service of the defendant company. The referee filed his findings of fact and conclusions of law and made an award against the defendant company from which the latter appealed to the Workmen's Compensation Board. It affirmed the award of the referee, and an appeal was taken to the Court of Common Pleas of Indiana County. The learned judge of the Court of Common Pleas reviewed the case in an exhaustive opinion and made an order sustaining the appeal, reversing the decision of the referee as affirmed by the board, and "remanded the case to the Workmen's Compensation Board for adjustment in accordance with the following award," the terms, as fixed by him, then being given.

It is apparent that the order entered by the court is not a final judgment from which only an appeal will lie to this court. Instead of remanding the case to the board for further and final action, which it had already taken, the court should have entered a final judgment awarding to each dependent the amount due him or her in the opinion of the court. There was no occasion for any

further adjustment by the board; it had taken final action, and the appeal which the learned court had before it was from such action. The appeal which we are authorized to hear and determine is not from the award of the board but from the judgment of the court.

The record is remanded that the court below may enter a final judgment on the appeal pending before it from the award of the Workmen's Compensation Board.

**Lamb v. Pennsylvania Railroad Company,
Appellant.**

Negligence—Master and servant—Railroad company—Safe place in which to work—Assumption of risk—Case for jury.

Where in an action against a railroad company to recover for personal injuries sustained by an employee standing on a ladder on the side of a moving freight car, in the discharge of his duties, being caught between such car and a car on the next track, it appeared that there was not sufficient clearance between the two tracks to afford a safe place for plaintiff to work; that the plaintiff did not know that the clearance between the tracks was less than the standard clearance and was insufficient, but had walked between cars standing on such tracks hundreds of times before in safety, the clearance ordinarily being eighteen inches; and that at the time of the accident he was caught by reason of the sudden lurching of the car on the next track, the question of defendant's negligence and plaintiff's assumption of risk were for the jury, and a verdict for the plaintiff will be sustained.

Argued Oct. 3, 1917. Appeal, No. 42, Oct. T., 1917, by defendant, from judgment of C. P. Washington Co., Nov. T., 1915, No. 423, on verdict for plaintiff, in case of J. W. Lamb v. Pennsylvania Railroad Company. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Trespass to recover damages for personal injuries.

IRWIN, J., filed the following opinion, sur defendant's motion for judgment n. o. v.:

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This is admittedly a close case. Counsel for the plaintiff in his brief speaks of it as a border line case, but after mature deliberation we have come to the conclusion that it was a case for the jury and not the court to decide. The verdict of the jury establishes the following facts, which are supported by sufficient evidence: The accident occurred in the Pennsylvania Railroad yards at Youngwood, in Westmoreland County, in what was known as the loaded classification yard. In that yard there were at least nineteen tracks leading off from what is known as the ladder track. The plaintiff had worked in that yard and the other yards adjoining for fifteen years, with the exception of two years about eight or ten years before the accident when he was working on the road. He was thoroughly familiar with all the yards and with all the tracks and had worked over all the tracks handling all kinds of cars.

On the morning of the accident No. 11 track was full of loaded coal cars for more than two hundred feet at least, down from the ladder track. The conductor of the shifting crew ordered them to take a certain empty car off track No. 10 and place it on track No. 19, and in order to get that car they had to hitch on and pull these eight or ten cars off No. 10 track, go up the ladder track and then back down on track No. 19 where they left this one car. They then pulled back up on to the ladder track and backed down to No. 10 track and down No. 10 track for the purpose of coupling up with the remaining cars standing on that track.

The plaintiff was a brakeman and as the cars were being backed by the engine down No. 10 track he was standing on the ladder on the side of the car next to No. 11 track, the ladder being close to the front end of the car. He was occupying that position so as to be able to see that the car properly coupled when backed against the end of the train of cars standing on that track. The car, on the side of which he was riding, was empty. He was standing with his foot or feet on the stirrup or lower step

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of the ladder and his left arm thrown over the top of the car. There was a flange on the top of the bed of the car, which extended out to about even with the edge of the posts which supported the side of the car bed. It was usual and customary for brakemen riding the cars in on these tracks to ride on the ladder on the side of the car just as the plaintiff was doing.

There were some eight or nine cars being shifted back on to No. 10 track, the same cars that had been taken off No. 10 in order to get the one car that was to be placed on No. 19 track. As the end of the car on which the plaintiff was standing reached a point about two hundred feet from the ladder track down on No. 10 track the plaintiff was caught between the side of the car on which he was riding and the side of a loaded car on track No. 11 and was squeezed and rolled round once between the cars and then fell to the ground between the tracks; by reason of which the plaintiff was very seriously, and, it was claimed, permanently injured. The plaintiff claimed to recover from the company on the ground that there was not sufficient clearance between tracks Nos. 10 and 11 to afford the plaintiff a reasonably safe place in which to work, and the plaintiff's right of recovery was resisted on two grounds especially, first, that he had been guilty of contributory negligence, and, second, that he was thoroughly familiar with the location of the tracks, had worked in the yard for almost fifteen years, and over these tracks Nos. 10 and 11 for at least ten years, and that he must be held to have assumed the risk.

The question of the plaintiff's contributory negligence was clearly a question for the jury and we may dismiss it from any further consideration and consider the question as to whether or not the court should enter judgment in favor of the defendant n. o. v. on the ground that the plaintiff appreciated the danger and must be conclusively presumed to have assumed the risk.

The plaintiff testified that when he was lying down on the ground he stretched his arms out and with his hands

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could touch one rail of track No. 10 and one rail of track No. 11, and he estimated that the tracks were 6 to 6 feet 6 inches apart. The engineer called by the defendant testified that at a point three hundred feet from the ladder track the distance between track No. 10 and track No. 11 was 6 feet 7 inches, and that two hundred feet from the ladder track the distance between the two tracks was 6 feet 9 inches. The standard gauge between tracks is 7 feet to 7 feet 5 inches. Louis Johnson, a witness called by the plaintiff, testified that he had been track foreman for the defendant company at the Youngwood yards and that he had helped to lay the tracks in this yard. He said they had aimed in laying the tracks to work to a gauge of 7 feet between the tracks, but that part of the ground over which they laid the tracks was a swamp, which they had to fill in, and that in laying tracks 9, 10 and 11 they did not maintain the gauge of 7 feet, but that they were laid with a narrower space than 7 feet between them.

The car on which the accident occurred was a Wheeling & Lake Erie gondola car No. 50539. Mr. Tarbell, a mechanical engineer for that road called by the plaintiff, testified that that was one of the widest of cars and that its width over all was 10 feet 1½ inches; that on the top of the bed of the car there were flare boards which extended up and out even with the outside edge of the posts and that the posts at the side of the car were about 6 inches thick. The standard width of a track between the rails is 4 feet 8½ inches, and the average width of the ball of a rail, or that part on which the wheels run, is 2½ inches. There was a very slight bend in the tracks at or near where the accident occurred, but there was no evidence to show what effect that would have upon the space between the cars on No. 10 and No. 11 tracks. The plaintiff testified that he had walked through between the cars on tracks Nos. 10 and 11 hundreds of times and that in riding a car in on track No. 10, as he was doing on the morning of the accident, he usually had a space of about eight-

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een inches between his car and the car or cars on track No. 11. He testified further that just before he was caught between the cars on the morning of the accident, the car on which he was riding made a lurch and sagged over towards the cars on track No. 11, and that it was because of this that he was caught between the cars; that he did not know that he would have been caught had the car not made that lurch. He testified further that he did not know what caused the car to make the lurch, and there was no evidence to show that either the car on which he was riding or track No. 10 was not in good condition. The plaintiff claimed that he was riding the car in the usual and ordinary way; that he had never heard of any brakeman being injured by being caught between cars at that point, and that he did not know that the place was dangerous.

Mr. Patterson, an assistant trainmaster of the Pittsburgh Division of the P. R. R. Co., with an office at Youngwood, testified that he regarded the place where the accident occurred as reasonably safe; the question and answer of Mr. Patterson being as follows: "Q. It was the aim of the company that the place where this accident occurred—it was the aim of the company at that place to provide a reasonably safe place for the brakemen to perform their duties, wasn't it? A. Yes, and in view of the fact that they had performed the duties there for sixteen years without an accident until this accident, was considered reasonably safe."

Mr. Cox, a witness called for the defendant, who was the general yardmaster at Youngwood, testified that this was not a safe place for the plaintiff to ride on the side of the car and that the only safe place for him to ride was on the inside of the car near the brake.

It was well said by counsel that this was a border line case, because it is a question of a few inches one way or another. If the space between these tracks had been a few inches less it would have been obvious to any one working there that it was dangerous and they would be

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held to have assumed the risk, and if the space had been a few inches greater than it was the place would have been perfectly safe and no accident would have happened. But in view of all the circumstances, considering that the plaintiff had worked over those tracks and between the cars for years, that no accident had ever happened, that men in the employ of the company, who were his superiors and who had worked in the yard for years, differed in their opinions as to whether it was a safe place to work or not, and in view of the further fact that there is no evidence to show that the plaintiff actually knew that the clearance between tracks Nos. 10 and 11 was less than the standard clearance between tracks in those yards, we think the question of the plaintiff's assumption of risk was a question of fact for the jury and could not be ruled as a question of law by the court.

In *Madden v. Lehigh Valley R. R. Co.*, 236 Pa. 104, it is said: "Before the maxim, *volenti non fit injuria*, can be invoked, it must be shown that the plaintiff not only knew, or had full opportunity to know the circumstances, but that he appreciated, or should have appreciated, the extent of the danger, and that he voluntarily exposed himself to it."

In *Valjago v. Carnegie Steel Co.*, 226 Pa. 514, it is said: "In a claim for negligence by an employee against his employer the maxim '*volenti non fit injuria*' cannot be invoked by the defendant unless he shows that the plaintiff not only knew the circumstances, but that he also appreciated the full extent of the danger to which he was exposed by his employment, and that he voluntarily exposed himself to it. This makes the question of the assumption of risk one of fact, unless from the nature of the case it is clear of dispute in this connection."

In *Madden v. Lehigh Valley R. R. Co.*, 236 Pa. 104, already cited, it is further said, in the opinion of the court, that,—“Although the decedent passed the point where he was killed just before the accident and had been over it in the performance of his duties at other times, it is not

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clear that he was in a position to see and appreciate the danger presented. Particularly is this so when we consider the testimony of the defendant's witness Kane,—its supervisor of tracks who had charge of the deposit of ashes in question,—to the effect that so far as he could see they presented no danger. This apparently was an instance where the risk was difficult to estimate, and under such circumstances the case was for the jury. 'Where there is any doubt whether the employed was acquainted or should have been acquainted with the risk, the determination of the question is necessarily for the jury': *Rummell v. Dilworth*, 111 Pa. 343, 351."

In *Stewart v. Central R. R. of N. J.*, 235 Pa. 311, it is said: "While an employee is deemed to assume the risks ordinarily and reasonably connected with his employment, and is presumed to have notice of those which are obvious, the employer is fixed with the duty to maintain instruments, appliances and conditions which do not expose his employee to dangers not ordinarily or reasonably incident to the employment; the latter has the right to presume that his employer has performed this duty, and he does not assume risks growing out of unusually dangerous conditions not to be reasonably anticipated by him.

"Where the measure of duty is a standard of ordinary and reasonable care, the degree of which varies according to the circumstances, and where the facts are disputed, or there is any reasonable doubt as to the inference to be drawn from them, the issues must be submitted to the jury."

In *Vorhees v. The Lake Shore & Michigan Southern Ry. Co.*, 193 Pa. 115, the plaintiff was injured while in the act of getting down from the top of a car, by coming in contact with a car standing on a siding, by reason of that siding having been constructed without a sufficient clearance between it and the main track. In disposing of the question of the assumption of risk Mr. Chief Justice STERRETT said: "Whether, from his experience, or

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from opportunities of examination afforded him before the time of the accident or otherwise, he knew, or ought to have known, the dangerous character of that siding, whether or not he was justified in choosing the time and manner of his descent from the top of the car, and whether or not, under the circumstances, and especially in view of the duties he was required to perform, he was guilty of any act of negligence which contributed to his injury, etc., were necessarily questions of fact for the jury, under all the evidence before them."

In *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, the syllabus correctly states the whole case as follows: "A woman, in leaving the mill in which she was employed, by means of steps covered with ice, fell and was injured. In an action against her employer to recover for such injuries, there was evidence that the ice was due to exhaust steam from an engine, run by the defendant, falling upon the steps and freezing, so as to cause varying degrees of slipperiness in different states of the weather; that the plaintiff was fifty-one years of age and had worked in the mill for thirteen years; that the steps afforded the only means of leaving the mill, and fifty women working in the same room with the plaintiff used them daily; that the plaintiff knew the steps to be icy and more or less slippery in the winter season; and that at the time of the accident she was going down the steps with a dinner pail in one hand, and holding on to the railing with the other. Held, that there was evidence tending to show that the defendant was negligent and that the plaintiff was in the exercise of due care; that whether the plaintiff assumed the risk was a question of fact for the jury; and that it could not be said as a matter of law that she appreciated the risk or that she was not acting under such an exigency as would justify her in going down by the steps, and deprive her act of that voluntary character which is referred to in the maxim, *volenti non fit injuria*."

In *Johnston v. Oregon S. L. & U. N. Ry. Co.*, 31 Pac.

Rep. 283, the court said: "An open and visible risk is such as would in an instant appeal to the senses of an intelligent person: Wood on Master & Servant, 763. It is one so plain that a person familiar with the business would instantly recognize it. It is a risk about which there could be no difference of opinion in the minds of intelligent persons accustomed to the service. It is not expected that a servant will make close scrutiny into all the details of the instrumentalities with which he deals. The servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger. It is not expected of a switchman that he should carefully measure the difference between a switch target and rail. This is the duty of the master and the servant has the right to assume that the track or other obstruction is at a reasonably safe distance, in the absence of anything to excite special apprehension of danger."

In Valjago v. Carnegie Steel Co., 226 Pa. 514, 519, the court said: "They urge the application of the maxim *volenti non fit injuria*, but before this maxim can be invoked it must be shown that the plaintiff not only knew the circumstances, but that he also appreciated the full extent of the danger to which he was exposed by his employment, and that he voluntarily exposed himself to it."

We think the authorities cited show clearly that it would have been error for the court to have taken this case from the jury and to have instructed the jury that the plaintiff must be conclusively presumed to have assumed the risk. The injury to the plaintiff by reason of his riding on the side of the car and being caught between that car and a car on track No. 11 by reason of the width of the car upon which he was riding and the lurching of the car at the time of the accident, and the further fact that the distance between the two tracks was less than the standard gauge, was not such an injury as was reasonably incident to the plaintiff's employment,

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and hence it could not be said that the plaintiff had assumed the risk of that injury, unless it was first shown that he knew that those tracks were less than the standard distance apart, and that he knew and fully appreciated the danger to which he was exposed in riding in on the side of the car at the time the accident occurred. And, as we have already pointed out, there being no evidence to show that the plaintiff knew the exact distance between the two tracks, or that they had been constructed and maintained with a less distance between them than the standard gauge between tracks maintained in that yard, and in view of the further fact that he had passed over those tracks on cars and between the cars hundreds of times for many years and never had heard of an accident, the court could not hold as a matter of law that he had assumed the risk, but was bound to submit it to the jury as a question of fact. It follows, therefore, that the motion for judgment for defendant non obstante veredicto must be overruled.

Verdict for plaintiff for \$7,232.50 and judgment thereon. Defendant appealed.

Errors assigned were rulings on evidence, answers to points, in refusing to direct a verdict for defendant and in refusing to enter judgment for defendant n. o. v.

Rufus S. Marriner, with him *James A. Wiley*, of *Wiley & Marriner*, for appellant.

A. J. Eckles, with him *Harry D. Hamilton*, for appellee.

OPINION BY MR. JUSTICE MESTREZAT, January 7, 1918:

We have carefully considered the testimony in this case, and the briefs of counsel and the authorities cited therein, and while, as suggested by both court and counsel, the case may be on the border line, we are not con-

vinced that the record discloses reversible error. The clear, impartial and entirely adequate charge omitted nothing which was necessary to enable the jury to intelligently consider the testimony and determine the facts of the case. The learned trial judge subsequently reviewed the facts and law in an exhaustive opinion overruling the motion for judgment non obstante veredicto for defendant and amply vindicating the judgment which he directed to be entered on the verdict.

There was no evidence in the case which would warrant a finding or even an inference that the plaintiff's injuries resulted from his own negligence. This is so clearly correct that a discussion of the question is not required. The serious question, and the one to which the appellant has devoted its extended argument, is that the plaintiff fully appreciated the danger and must be conclusively presumed to have assumed the risk of the service he was performing at the time he was injured. The plaintiff was a brakeman employed by the defendant company in its loaded classification yard at Youngwood, Westmoreland County, Pennsylvania. He had worked in that and the defendant's adjacent yard about thirteen years, was familiar with the yards and the numerous tracks and had handled all kinds of cars on them. On the morning of the accident, the conductor of the shifting crew ordered them to shift one of eight or ten cars on track No. 10 to another track, and, in order to do this, they had to pull all the cars off the track, place the one car on the other track, and then replace the remaining seven or nine cars on track No. 10. While backing these cars on track No. 10, the plaintiff was standing in his proper place on the ladder on the side of the car next to track No. 11, the ladder being close to the front end of the car on which he was riding. He was standing with his feet on the ladder and his left arm thrown over the top of the car. While in this position, he was caught between the side of the car on which he was riding and the side of a loaded car on track No. 11 and seriously

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injured. The plaintiff alleged that the defendant was negligent in not leaving sufficient clearance between tracks Nos. 10 and 11 to afford a safe place in which to work. Negligence and assumption of risk by plaintiff were the grounds of defense.

We have already alluded to the fact that the evidence was insufficient to convict the plaintiff of contributory negligence. The reasons for submitting to the jury the question of assumption of risk are so clearly stated in the opinion of the learned trial judge that we deem it unnecessary to refer to and discuss the testimony bearing on the question, as the learned trial judge does so at length in his opinion, and shows conclusively that the evidence would not support a directed verdict for the defendant on that issue. The facts, as stated by the court, will be found in the opinion of the court below. As a result of his reëxamination of the case on the motion for judgment, the learned court concludes as follows: "In view of all the circumstances, considering that the plaintiff had worked over those tracks and between the cars for years, that no accident had ever happened, that men in the employ of the company, who were his superiors and who had worked in the yard for years, differed in their opinions as to whether it was a safe place to work or not, and in view of the further fact that there is no evidence to show that the plaintiff actually knew that the clearance between tracks Nos. 10 and 11 was less than the standard clearance between tracks in those yards, we think the question of the plaintiff's assumption of risk was a question of fact for the jury and could not be ruled as a question of law by the court. . . . The injury to the plaintiff by reason of his riding on the side of the car and being caught between that car and a car on track No. 11 by reason of the width of the car upon which he was riding and the lurching of the car at the time of the accident, and the further fact that the distance between the two tracks was less than the standard guage, was not such an injury as was reasonably inci-

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dent to the plaintiff's employment, and hence it could not be said that the plaintiff had assumed the risk of that injury, unless it was first shown that he knew that those tracks were less than the standard distance apart, and that he knew and fully appreciated the danger to which he was exposed in riding in on the side of the car at the time the accident occurred. . . . It follows, therefore, that the motion for judgment for defendant non obstante veredicto must be overruled."

Judgment affirmed.

Kutz's Estate.

Equity—Contract for sale of real estate—Specific performance—Laches—Failure to make tender—Refusal.

1. Tender of performance on the part of the plaintiff is prerequisite to a decree for specific performance of a contract for the sale of real estate.

2. In a suit for specific performance, the plaintiff must show he has performed, or was ready to perform his part of the contract, and that he has not been guilty of laches or unreasonable delay, and where the proof leaves the case doubtful the plaintiff is not entitled to a decree.

3. The granting of specific performance by a chancellor is a matter of grace, not of right.

4. In a proceeding in the Orphans' Court to compel specific performance of a contract for the sale of real estate owned by a decedent, where it appeared that the relief was not sought for more than three years after performance was due under the contract, that the petitioner was a corporation whose board had by resolution previously granted decedent and others leave to withdraw from the contract; that no tender of the consideration was made by the petitioner; that there was no resolution of the board authorizing the institution of the proceedings and many stockholders of the petitioner were opposed thereto, and where if the decree prayed for should be granted, a purchase-money mortgage would have to be given upon which foreclosure proceedings would in all probability have been necessary in the near future causing delay and inconvenience and expense, the court was not in error in refusing the relief prayed for.

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Argued Oct. 4, 1917. Appeal, No. 139, Oct. T., 1917, by The Laurel Hill Valley Coal & Coke Company and Henry D. Green, from decree of O. C. Somerset Co., 1917, No. 9, refusing specific performance of a contract, in Estate of Cyrenius W. Kutz, Deceased. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Petition for specific performance of a contract for the sale of real estate.

RUPPEL, P. J., filed the following opinion:

While there has been considerable testimony taken, there is very little dispute as to the facts, and instead of stating the facts separately in order as requested by counsel for respondents, the court deems it sufficient to give a narrative statement covering such facts as are important in the case.

Cyrenius W. Kutz, a resident of Somerset County, was the owner of certain lands and minerals situate in Somerset County and on the 30th day of January, 1911, he executed two articles of agreement one relating to certain lands owned by Mr. Kutz, in fee simple, and the other relating to coal and other minerals. Both agreements are substantially the same in form and are made by Mr. Kutz of the first part, and "Henry D. Green, attorney for a proposed corporation of Pennsylvania, with \$50,000 capital stock of the second part." For the several tracts of land owned in the fee simple by Kutz, the consideration was fixed at \$12,354, and for the coal and mineral only, the consideration was fixed at \$12,604, to be paid "in the following manner: One dollar down at the signing of the agreement, 10 per cent. in capital stock in the proposed corporation above mentioned, and the remainder to be secured by a bond and mortgage of said corporation upon the premises described below, within three years from the date of said mortgage, interest to be paid at 5 per cent. after possession is delivered to mortgagor. . . . And upon payment of said pur-

chase-money provided above, the said party of the first part will at the proper charge of the said party of the second part, make, execute and deliver to the said party of the second part a good and sufficient deed, etc. . . . And it is further agreed by and between the said parties that possession of the said premises shall be delivered to the party of the second part, his heirs or assigns, on the day possession is requested in writing by the said party of the second part, his heirs or assigns, until which time the said party of the first part shall be entitled to have and receive the rents, issues and profits thereof. . . . It is further agreed that the said party of the first part will execute and deliver the deed of conveyance as above mentioned, to the directors of the proposed corporation after a charter has been granted and that upon delivery of such deed, said corporation will execute the mortgage above referred to as part of the consideration, and make out certificates of stock to the said party of the first part for the amount of the purchase-money, which is to be payable in stock; said mortgage after execution and said stock after being issued, is to be placed in the hands of the directors of said corporation with the executed deeds, they to hold the same until the property is sold and thereby money is raised to pay off the mortgages and the amounts due on distribution among the stockholders."

On the 23d of October, 1911, an application was filed for a charter for the Laurel Hill Valley Coal & Coke Company; the purpose of the corporation being stated to be the mining, selling and shipping of coal and other minerals incidentally developed, and the making of coke and its products from such sale, and as far as may be necessary for the purposes of said business, acquiring, holding and disposing of coal, coal lands and other real and personal property, and transacting such other business as is incidental to said purposes. The amount of the capital stock of the corporation was fixed at \$50,000 divided into 1,000 shares of the par value of \$50 each. Among the subscribers to the capital stock is the Laurel

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Hill Lumber Company, 90 shares; C. W. Kutz, 52 shares; Cosmos D. Kutz, 2 shares; Daniel H. Schweyer, 12 shares, and Albert Knabb, 5 shares. The last of the three above-named paid their subscriptions to stock and are the only ones who paid any money on the stock subscriptions. The officers of the corporation sold stock of the company to the amount of \$5,000 which was paid into the treasury. This money was the only asset of the corporation. The charter was duly recorded in Berks County but was not recorded in Somerset County.

On the 11th of November, 1911, at a meeting of the stockholders of the Laurel Hill Valley Coal & Coke Company, the following resolution was unanimously adopted: "Resolved, That in the mortgages directed to be given to the company according to the agreement of incorporation, they be made payable on or before July 1, 1914, and it be provided in said mortgages and deeds that the privilege be given to any landowner to withdraw his land after said date, upon cancellation of the mortgage and the shares of stock issued to him on account of the purchase-money."

On the 23d of January, 1912, a meeting of the stockholders of the Laurel Hill Valley Coal & Coke Company, held at Confluence, Pa., C. W. Kutz, George Dumbauld and Jacob Kregar were appointed a committee to prospect a number of tracts of land by examining the present openings, drilling of coal, obtaining surveys, engineers' reports, analyses of the coal, etc., on lands which the corporation intended to purchase; the lands included those of the decedent, C. W. Kutz. This committee expended \$3,644.56. No detailed report of the doings of this committee was made until May 5, 1915, when the committee submitted a report showing what had been done, the names of the surveyors and engineers employed, the amount of money expended, etc. This report in two sections, is dated as follows: 5-5-15 as of 7-1-14."

On June 17, 1915, Henry D. Green wrote to C. W.

Kutz stating that the Laurel Hill Lumber Company, a corporation in some way connected with the Laurel Hill Valley Coal & Coke Company, had executed mortgages and stock certificates for the latter company, which were placed in escrow, and Mr. Green with his letter enclosed deeds for Mr. Kutz and his wife to execute in accordance with the articles of agreement of January 30, 1911; and Mr. Kutz is advised in this letter that his deeds upon receipt will be placed with the other agreements and papers in escrow; and the letter proceeds: "In other words, when a purchaser is found and the money paid, it will be paid to the trust company for payment to the property owners according to the terms of the agreement, and no title will pass to purchasers nor will any deed be delivered except upon the conditions set forth in the agreement. In this way the rights of all parties will be perfectly safeguarded. I am preparing deeds to be signed by other landowners according to the terms of their agreements and I will ask you to assist me in having as much of this land put into shape for sale as possible.

On the 30th of June, 1915, Mr. Green again wrote to Mr. Kutz stating that he was waiting for a reply to his letter of June 17th.

On the 1st of July, 1915, Mr. Kutz acknowledges receipt of these letters and says: "Will say in reply that so far as your letter of recent date is concerned and what you ask me to sign I will not do as I consider all options void since July 1, 1914. Had you and others of your committee tried as hard to effect a sale as Dumbauld, Kregar and myself did to get surveys made and prospecting done, we might not now be a company without property to dispose of. . . . I will not sell any of my lands for a worthless mortgage."

No further steps were taken during the lifetime of Mr. Kutz, who died May 16, 1916, and his daughter, Mrs. Barron, was appointed his administratrix. The agreements between Mr. Kutz and Mr. Green purport to have

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been signed by C. W. Kutz and Susannah C. Kutz his wife, and in that form were handed to Mr. Green by Mr. Kutz. D. H. Schweyer signed as an attesting witness to Mrs. Kutz. The agreements were not acknowledged before a magistrate, but after the death of Mr. Kutz, Mr. Green acknowledged his signature to the articles of agreement and had same placed upon record in Somerset County.

On the 15th of January, 1917, the administrator of C. W. Kutz presented a petition for an order for the sale of real estate for the payment of debts. The petition sets forth that the debts of the decedent amount to over \$55,000 and the personal property less than \$1,300, and asks for the sale of the real estate including the lands and minerals described in the agreement between Mr. Kutz and Mr. Green. An order of sale was granted on the 16th of February, 1917. The real estate described in the order was sold to J. C. Barron, husband of the administratrix for \$8,000. Mr. Green for himself and as attorney for the Laurel Hill Valley Coal & Coke Company, filed exceptions to the sale, and also presented the petition for specific performance of contract. There were gross irregularities in the conduct of the sale, and if a proper party in interest had filed exceptions they would doubtless have been sustained, but as we have concluded that neither Mr. Green nor the Laurel Hill Valley Coal & Coke Company has any interest in the estate, we need give the exceptions no further consideration.

The rule for decree of specific performance of contract was served upon the administratrix, the widow, and each of the eight children of the decedent, being all the legal heirs and representatives concerned in the estate. They have all filed answers practically admitting the facts as set forth in the petition, but denying the petitioners' right to specific performance, alleging specifically the resolution of the Laurel Hill Valley Coal & Coke Company fixing the maturity of the mortgage as in 1914,

and averring laches on the part of the petitioner; and also denying authority on part of Mr. Green as a representative of the Laurel Hill Valley Coal & Coke Company to institute and conduct the litigation. The widow, Susannah C. Kutz, filed an answer of similar import, but also in a manner denying her signature to the articles of agreement. This denial in her answer is in the following form: ".....I think it is his genuine signature, but there appears upon said agreements with the name of Cyrenius W. Kutz, the name of Susannah C. Kutz. I was the wife of Cyrenius W. Kutz at the date said agreements purport to have been signed by him. My name does not appear on said agreements. The name of the widow of Cyrenius W. Kutz is Susan C. Kutz, and I, the widow of said decedent, have at no time written my name Susannah C. Kutz, and I have no recollection of signing said agreements and I do not recognize the signature purporting to have been signed by Susannah C. Kutz as having been written by me, though there is some resemblance in those signatures with my own genuine signature." The name of Daniel H. Schweyer appears on the agreements as an attesting witness to the signature of Mrs. Kutz; and depositions have been taken to prove the death of Daniel H. Schweyer, and that the signature on the agreement is the genuine signature of Mr. Schweyer; and the agreements in that form, with the name of Mrs. Kutz appearing thereon after the name of C. W. Kutz, were handed to Mr. Green by Mr. Kutz. Mr. Kutz was a very reputable citizen, and therefore for the purposes of this case, we find as a fact that the signature on the agreements is the genuine signature of Mrs. Kutz.

Beginning with September 8, 1913, Mr. Kutz contracted indebtedness amounting to \$22,472.82, and this indebtedness was subsequently increased until the amount with interest totaled \$36,372.64 as of January 1, 1917. For this indebtedness Mr. Kutz executed a mortgage on his real estate including that in controversy here, to his son-in-law, J. C. Barron for himself and as trustee for

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the other creditors. The assets of the Laurel Hill Valley Coal & Coke Company were all expended in prospecting on lands of Mr. Kutz and others, spoken of as the pool, for the purposes of ascertaining the extent and quality of the coal and minerals thereon. The certificates of stock of the Laurel Hill Valley Coal & Coke Company for Mr. Kutz, as referred to in the optional agreements, were never tendered to Mr. Kutz, in fact were never executed by the corporation. No formal action has been taken by the corporation authorizing Mr. Green to prosecute these proceedings. In fact a number of the stockholders were called as witnesses and by their testimony indicated their hostility to this proceeding. There is no prospect for an immediate sale of the coal by the Laurel Hill Valley Coal & Coke Company were it to become the owner of the premises. Under these circumstances we are decidedly of the opinion that the relief sought for should not be granted. Were the parties reversed and the estate of Mr. Kutz seeking to enforce the contract there would be little prospect of success.

The agreement with the attending circumstances therefore lacks mutuality, which is fatal to the petitioners' case: *Meason v. Kane*, 63 Pa. 335.

The vendee has slept too long on its rights, and under all the facts of the case has been guilty of laches.

"In a suit for specific performance, the plaintiff must show he has performed, or was ready to perform his part of the contract, and that he has not been guilty of laches or unreasonable delay, and where the proof leaves the case doubtful, the plaintiff is not entitled to a decree": *Bouvier's Law Dictionary*, page 3106; *DuBois v. Baum*, 46 Pa. 537; *Nickerson v. Nickerson*, 127 U. S. 668 (L. Ed. 314); *Wesley v. Eells*, 177 U. S. 370 (L. Ed. 810).

Tender of performance on part of the petitioner is a prerequisite to a decree of specific performance of contract: *DuBois v. Baum*, *supra*.

"When a man has an option upon property, and has

laid by for several years without exercising it, and it has greatly enhanced in value, if he claim a conveyance of it, he should at least show a tender of the purchase-money, or that his appointee has the means to pay for it": *Kellow v. Jory*, 141 Pa. 144.

"It is well settled that to entitle a plaintiff in ejectment—founded on an equity only—to recover, he must not only tender the money before suit brought, but he must show his readiness to perform by having it in court ready to be paid in the event of a verdict in his favor": *Dwyer v. Wright*, 162 Pa. 405.

Furthermore, the granting of relief by a chancellor is a matter of grace and not of right. True, the court must exercise a legal discretion, not rule the matter arbitrarily, but be governed entirely by equitable principles: *Burk's App.*, 75 Pa. 141; *Rigg et al. v. The Reading & S. W. Street Ry. Co.*, 191 Pa. 298; *Federal Oil Co. v. Western Oil Co.*, 121 Fed. Rep. 674; *Nickerson v. Nickerson*, *supra*; *Wesley v. Eells*, *supra*.

In this case the article of agreement provided for the securing of the purchase-money by a mortgage on the property to the vendor, and as is shown by the agreement and the subsequent correspondence, it was the purpose and intention of the parties at the time to sell the property, not to operate it, and it was expected that the mortgage should be paid out of the proceeds of such sales. The agreement itself is silent as to the time of the delivery of deed and security by mortgage, therefore the law would fix a reasonable time, in the absence of any proof; but the parties themselves seem to have considered that three years was a reasonable time; in fact, the agreement provides that the mortgage is to be made payable in three years from its date, and it is fair to presume that the parties contemplated an early issuing of the stock and exchange of papers. The charter was promptly obtained; then the action of the corporation fixing the first of July, 1914, as the time for the limitation of the mortgages, is in harmony with what appears to have been the understanding at the time the papers

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were executed. Within that time no demand was made of Mr. Kutz, and when a demand was made upon him a year later he promptly took advantage of the resolution passed by the stockholders of the petitioning corporation. From the light that we have now, were we to grant a decree of specific performance, it would simply mean that a deed should be executed to the Laurel Hill Valley Coal & Coke Company and a mortgage given by that company for the bulk of the purchase-money with no immediate prospect of a sale of the land in view, and with a strong probability that resort would have to be had to legal proceedings to enforce the payment of the mortgage, and probably result in a sheriff's sale of the property, thus entailing great expense, long delay and unnecessary trouble.

The court refused the relief prayed for. The Laurel Hill Valley Coal & Coke Company and Henry D. Green appealed.

Errors assigned were as follows:

1. The court erred in not decreeing the specific performance prayed for by the petitioner.
2. The court erred in admitting a great deal of testimony entirely immaterial and irrelevant to the questions involved.

Henry D. Green, with him *C. F. Uhl* and *H. F. Yost*, for appellants.

J. A. Berkey, for appellee.

PER CURIAM, January 7, 1918:

The majority of the court are of opinion that this decree should be affirmed on the opinion of the learned court below dismissing the exceptions to the sale and to the petition for specific performance of contract. Even if there were any merit in the appeal it could not be sustained for the disregard of the rule relating to assignments of error. Neither of the two is in proper form.

Decree affirmed at appellants' costs.

City of Pittsburgh v. Pittsburgh Railways Company, Appellant.

Jacoby v. Pittsburgh Railways Company, Appellant.

Street railways—Rates—Change of rates—Posting and publication—Public Service Commission—Act of July 26, 1913, P. L. 1374.

1. The posting and publishing of a schedule changing the rates of a railway company are a condition precedent to the taking effect of the changed rate, and where the schedule of change is not properly posted the Public Service Commission may restrain a railway from putting the rate into effect.

2. An order of the Public Service Commission, requiring a street railway company to desist from collecting an increased rate of fare, which the company undertook to establish by a schedule filed with the Public Service Commission, was properly affirmed by the Superior Court, where it appeared that copies of the new schedule were sent to the agents of the railway company at its offices and stations where the business of the company was transacted, with directions to keep a copy of the same on file with the copy of the schedule of fares for street car service on file at such stations, but where no copy of the schedule was posted in the rooms to which the public had access, as required by Section 1 of Article II of the Public Service Company Law.

Argued Oct. 9, 1917. Appeals, Nos. 77 and 78, Oct. T., 1917, by defendant, from decree of Superior Court, April T., 1917, Nos. 97 and 98, affirming order of Public Service Commission, Complaint Docket, 1916, Nos. 1037 and 1025, in cases of City of Pittsburgh v. Pittsburgh Railways Company and W. M. Jacoby v. Pittsburgh Railways Company. Before MESTREZAT, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Appeal from Superior Court.

HENDERSON, J., filed the following opinion, vide 66 Pa. Superior Ct. 243:

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Statement of Facts.

This is an appeal from the decision of the Public Service Commission requiring the Pittsburgh Railways Company to desist from collecting an increased rate of fares which the company undertook to establish by a supplementary schedule of fares filed with the Public Service Commission on May 22, 1916. The paper filed with the Public Service Commission was contained in a cover bearing the following superscription: "Supp. No. 2, P. S. C. Pa. No. 1," but having no other indication of the contents of the enclosure. Copies of the schedule were sent to agents of the appellant at its offices and the stations where the business of the company was transacted and with each copy so sent was a letter containing the following instruction: "This is to be kept with the copy of the schedule and rates of fares for street car service on file at your station." The copies of the amended schedule thus distributed were placed by the employees to whom they were sent, among the papers of the company there kept or were hung on the walls or placed on desks in rooms occupied by employees of the company but were not in rooms to which the public resorted. No other information was given of the proposed increase to the fare than that arising from the filing of the amendment to the schedule with the Public Service Commission and with the agents of the company. The questions in controversy are whether the amendment to the schedule was "posted and published" in accordance with the provisions of the Public Service Commission Act of July 26, 1913, and whether the amendment plainly stated the exact changes proposed to be made in the tariff then in force and whether an increase or decrease. It is provided in paragraph seven of Section 1, of Article II of the statute that it shall be the duty of every public service company "to make no change in any tariff or schedule which shall have been filed or published or posted by any public service company in compliance with the preceding sections, except after thirty days' notice to the commission and to the public, posted and published in the man-

ner, form and places required with respect to the original tariffs or schedules which shall plainly state the exact changes proposed to be made in the tariffs or schedules then in force, and whether an increase or decrease, and the time when the proposed changes will go into effect; and all such changes shall be shown by filing, posting and publishing new tariffs or schedules or shall be plainly indicated upon the tariffs or schedules in force at the time and kept open to the public inspection." The Public Service Commission determined that the supplementary schedule was not a legally filed, posted and published tariff and that there was nothing therein which plainly stated the exact change proposed to be made and that it contained nothing which indicated whether or not there was to be an increase or decrease in fares. The contention of the appellant is that the tariff was properly posted and published and that it plainly shows a proposed increase in fares. It is not alleged that the company did any other thing with reference to publishing the amendment of the schedule than file a copy in the office of the Public Service Commission and a photographic copy thereof in each of its car barns and at stations where passengers are received and at which station agents or ticket agents are employed. It is asserted by the appellant that the placing of a copy of the amended tariff in the custody of its employee or employees in its stations and car barns to which access might be had by the public on request is a compliance with the requirements of the law as to posting and publishing and that, having sent a copy of the amendment to the schedule to each station, ticket office and car barn at which street railway tickets are customarily sold or at which they might be purchased if application were made, it complied with all the demands of the law as to notice of a change in its tariff increasing the rate of fare. It is further contended that the requirement for posting at stations is directory, not mandatory; by reason whereof a failure to post and publish tariffs in the company's station would not have invalidated the

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rate. If this position is correct and the notice was sufficient in form the change in the tariff has taken effect and the appellant has avoided the burden of proof imposed by the 4th section of Article V of the statute which provides that whenever the commission receives a notice of any change proposed in any tariff or schedule filed or posted under the provisions of the Act of July 26, 1913, P. L. 1374, it shall have power to hold a public hearing and make investigations as to the propriety of the proposed change and make such order in reference to the new rate as would be proper in a proceeding initiated after the same had become effective, at which hearing involving a proposed increase in rate, the burden of proof to show that such increase is just and reasonable shall be upon the public service company. It will be observed that a prohibition is imposed on public service companies to change an established tariff, except after thirty days' notice to the commission and to the public. The object of such a regulation is obvious. The rate having once been established it is regarded as *prima facie* a proper rate. The public has an interest in the subject; the corporation is operated for the accommodation of the public and is limited in its charge to amounts which are reasonable. A change of rate imposing an additional burden on the public calls for explanation and justification before the commission. The legislative intention was, therefore, to give those interested a fair opportunity to appear at an appointed time before the commission to present objections to the proposed increase in order that the whole subject might be considered by the commission before a change of rate took effect. Provision is not only made for notice, but for the manner and substance of the notice. It is to be posted and published in the manner, form and places required with respect to the original tariffs or schedules and shall plainly state the exact changes proposed to be made and whether an increase or decrease. Referring to

the provisions of the statute as to the requirements with respect to original tariffs, it will be seen that they also are to be posted and published in every office or station of the company open to the public where payments are made by patrons in such manner, form and place in such office or station as to be readily accessible and so that said tariffs and schedule may be conveniently inspected by the public. The duty to post and publish exists in each case. The notice of a change is a thing distinct from the tariff itself, for the same clause after providing for the kind of notice, provides as follows: "And all such changes shall be shown by filing, posting and publishing new tariffs or schedules or shall be plainly indicated upon the tariffs or schedules in force at the time and kept open to public inspection." The purpose of the notice with respect to a change in the rate is different from that applicable to an original tariff and the language is to be interpreted so as to accomplish the object intended; that is, to inform the public in advance of the intention to collect an increased fare. It is unnecessary to determine whether the notice required is to be given separate and apart from the amended schedule as contended for by the appellees or whether it may be connected therewith. In either case the information would be given which the law contemplated. The appellant contends that notice is imparted and published by filing the schedule with the Public Service Commission and in the places designated by the law for that purpose. It is not a controverted proposition, however, that notice must be given of the intended change. The real question then is, what is meant by the requisition of the law that notice of the intended change be posted and published? If it be conceded that filing with the commission and in the stations, etc., of the company be a sufficient promulgation and publishing, account must still be taken of the necessity of posting the notice. The popular meaning of the word "post" corresponds with that attached to it by lexicographers. It

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means the bringing to the notice or attention of the public by affixing to a post or wall, or putting up in some public place; to placard. This is a usual and efficient method of bringing to the notice of the public matters in which they are interested and there is nothing in the statute which suggests that the term "posted" was used in any other sense than that. It was the means to be adopted to bring to the attention of the public a matter affecting their interests. The notice thus to be given is made a condition precedent to the establishment of an amended tariff. Original schedules are filed without prior notice. The obligation rests on the company to file such schedules but no provision is made for precedent notice of their adoption. But, in the case of changes in the tariff or schedule, thirty days' notice to the commission and the public must be given. It is admitted that there was no posting of notice by the appellant unless the filing of the amended schedule is to be regarded as posting. But when we consider that the words "posted" and "published" are used in connection, with reference to the subject, we are unable to view the language in a light which makes the filing of a paper in the general office of the company and in its stations and car barns the equivalent of posting. The evidence shows that such filing did not have the effect of bringing notice home to the public in the City of Pittsburgh and as the purpose was to provide such notice, it is more reasonable to conclude that the legislature meant what is ordinarily signified by the term used and which was more likely to produce the desired result than would be accomplished by placing the document, which was intended to inform the public, in a desk or in a private office or in some other place in which it could only be seen by the persons interested when specially asked for. Attention is called by the learned counsel for the appellant to the similarity between the Interstate Commerce legislation and the Public Service Statute in regard to adopting and changing

rates, fares and charges. It will be observed, however, that the Interstate Commerce legislation, with respect to changes, requires thirty days' notice to the public "published as aforesaid." The word "posted" is omitted from the amendment of 1910 relating to the subject.

It is true, as pointed out in the appellant's argument, that the requirement of the Interstate Commerce law that schedules should be posted in two public and conspicuous places in every depot, etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, as was decided in *Tex. & Pac. R. R. Co. v. Cisco Oil Mill*, 204 U. S. 449. And the same ruling was made in *Kansas City Southern Ry. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573, and in *United States v. Miller*, 223 U. S. 599. But these decisions dealt with the establishment of the original tariffs. The companies were compelled to adopt schedules. They were also required to post the same in two public and conspicuous places in every depot, but this posting was not made a condition on which the rates became effective. It was a provision based on the existence of an established rate and had for its object the affording of facilities to the public for ascertaining the rates actually in force. In the case last cited attention is called to the distinction between "publication" and "posting," the former consisting in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of informing the public what are the rates in force. This applies, as will be observed, to existing rates. The distinction is that the company had authority to fix its original rates and file its schedules, but in the case of a change of rate something must be done by the company before it could put the change in effect. That something, is the giving of the notice by

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posting and publication of the proposed change, which notice shall plainly state the exact change proposed to be made in the tariffs or schedules then in force and whether an increase or decrease and the time when the proposed change will go into effect. This is clearly dealing not with a fact accomplished, but with a proposal of the company to become an established rate after thirty days. It is urged, however, that the plan adopted was in accordance with Tariff Circular No. 4 of the Public Service Commission. It is unnecessary to consider whether the provisions of that document are in harmony with the statute with respect to the manner of posting and publishing tariffs. It is sufficient to say that that circular relates to established rates and was apparently intended to provide a means by which the tariffs and schedules could be conveniently inspected by the public. It does not attempt to dispense with the posting and publishing of notice of the intention to change a rate. It is not to be expected, nor is it required, that the public be alert to inquire from day to day at the various places of business of the company whether a change of rate is in contemplation. Information as to existing rates must be sought after at the prescribed places, but notice of a changed rate must be brought to the attention of the public by posting and publishing. A notice in a station, car barn or other place to which the patrons resort, informing them that the information as to rates will be furnished them on request is not, we think, a lawful substitute for the notice of an intended change of tariff which the law requires to be posted and published. It is a fair inference from the evidence that the appellant's officers did not consider that the standing notice to apply to the company's employees for information as to tariffs gave general information that there was to be a change of rates of fare, for when the new rate was about to be put into effect notice was given by advertisements in the city papers and by conspicuous cards posted in the street

Statement of Facts—Opinion of the Court. [259 Pa. cars, calling attention to the increased rate to be charged within a day or two.

The commission reached the conclusion that the amended tariff, as filed, did not plainly state the exact change proposed to be made and whether such change was an increase or decrease. We do not deem it necessary to enter into a discussion of the evidence on that subject as the first objection to the regularity of the procedure to change the rate is sufficient to support the action of the commission. We hold that the notice of a proposed change of the tariff and schedule was not posted and published as required by the statute; that such posting and publishing was a condition precedent to the taking effect of the changed rate and that the action of the commission in restraining the appellant from putting the new rate into operation was a lawful exercise of authority.

The Superior Court affirmed the order of the Public Service Commission. The Pittsburgh Railways Company appealed.

Error assigned was the decree of the court.

A. W. Robertson, David A. Reed, George E. Shaw and Reed, Smith, Shaw & Beal, for appellant.

C. A. O'Brien, City Solicitor, *C. K. Robinson* and *C. Elmer Bown*, for appellees.

Berne H. Evans, for the Public Service Commission.

PER CURIAM, January 7, 1918:

These judgments are affirmed on the opinion of the learned Superior Court dismissing the appeals from the decisions of the Public Service Commission.

**Beaver Trust Company v. Morgan et al.,
Appellant.**

Principal and surety—Assignment of debt—Transfer of collateral security—Default—Sale of collateral—Application of proceeds to unsecured debt—Value of stock—Evidence—Discharge of surety.

1. A purchase of a debt is a purchase of all securities for it, whether named or not named at the time of the assignment, unless expressly agreed at the time that they shall not pass.

2. A surety is entitled to every remedy which the creditor has against the principal, to enforce every security and all means of payment, and to stand in the place of the creditor, not only through the medium of the security pledged but even of securities taken without his knowledge.

3. If a creditor releases the principal from the payment of the debt, he thereby releases the surety entirely, but if he releases the principal from a part only, the surety is released only pro tanto.

4. While ordinarily the price obtained for an article in the open market is the best evidence of its value, where a creditor sells a pledged security on default of the debtor and buys it at its own sale and improperly applies the proceeds to a debt other than the one secured, such appropriation casts sufficient discredit upon the bona fides of the sale to warrant a finding that the real value of the security was greater than the price obtained.

5. Where collateral pledged as security for a note upon which there is a surety is applied by the holder of the note to the payment of another obligation of the maker, without the consent of the surety, the surety is relieved from liability on the note pro tanto.

6. Where in such case the value of the collateral was sufficient to discharge the note and such collateral was sold and the proceeds applied to the payment of another obligation of the maker of the note, the debtor could not thereafter successfully claim any part of the proceeds of a sheriff's sale of the real estate of the surety, although his judgment was prior to that of other creditors.

Argued Oct. 2, 1917. Appeal, No. 31, Oct. T., 1917, by The Peoples National Bank of Rochester, Pa., from order of C. P. Beaver Co., June T., 1916, No. 220, sustaining exceptions to sheriff's return of distribution of proceeds of a sheriff's sale, in case of Beaver Trust Company v.

568 BEAVER TR. CO. v. MORGAN et al., Appellant.

Statement of Facts—Opinion of the Court. [259 Pa. Guy H. Morgan, The Peoples National Bank of Rochester. Before BROWN, C. J., MESTREZAT, STEWART, FRAZER and WALLING, JJ. Affirmed.

Exceptions to return of sheriff, showing distribution of the proceeds of a sheriff's sale. Before BALDWIN, P. J.

The opinion of the Supreme Court states the facts.

The court sustained the exceptions. The Peoples National Bank of Rochester, Pa., appealed.

Error assigned was in sustaining the exceptions.

A. P. Marshall, with him Chas. R. Eckert, for appellant.

William A. McConnel, for appellee.

OPINION BY MR. JUSTICE STEWART, January 7, 1918:

This dispute arises out of the distribution of the proceeds of the sheriff's sale of the real estate of one J. W. Jack. The original transaction out of which the controversy arises presents no unusual feature; nor are the facts relating to the subject in dispute. On the 7th March, 1911, the Monaca National Bank loaned to M. L. Jack the sum of \$1,450, taking as security therefor a judgment note signed by M. L. Jack and J. W. Jack in like amount, payable at four months, and also fifteen shares of the capital stock of the Rochester Trust Company owned by M. L. Jack, as collateral. The loan was renewed at regular intervals until 15th April, 1913, on which day judgment was confessed and entered upon the single bill given by way of renewal in favor of Robert C. Campbell, cashier, and against M. L. Jack and J. W. Jack, reduced later in amount to \$1,425. On 4th December following the obligation was again renewed, but in somewhat different form, the change not affecting, however, in any way the legal status of the parties, except to

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make J. W. Jack guarantor instead of surety, leaving the contract in all other respects the same as before. On March 4, 1916, the Monaca National Bank sold, assigned and set over to the Peoples National Bank all its right, title and interest in the renewal note, and as part of the transaction turned over to the said bank the fifteen shares of Rochester Trust Company stock which M. L. Jack had deposited with it as collateral to the original loan, and assigned to said bank the judgment it had entered on the single bill of M. L. and J. W. Jack. Meanwhile, 18th February, 1916, M. L. Jack had obtained a loan from the Peoples National Bank of \$1,780 on his own obligation, containing a power of attorney for the confession of judgment. As collateral security for this loan M. L. Jack pledged the fifteen shares of Rochester Trust Company stock that he had previously pledged to the Monaca Bank. These shares having come into the possession of the Peoples Bank, upon default of payment by M. L. Jack, the Peoples Bank, as it had a right to do under its contract, on 20th June, 1916, sold the fifteen shares of stock of the Rochester Trust Company for the sum of \$1,290, and applied the same as a credit to the \$1,780 note of M. L. Jack.

J. W. Jack, the surety, was the owner of certain lots of ground in the Borough of Rochester, in Beaver County, on which there was a first lien of \$3,645.54 in favor of the Beaver Trust Company; next in priority was the lien of the judgment entered by the Monaca Bank to No. 215, June Term, 1913, against M. L. and J. W. Jack, for \$1,450, for the loan to M. L. Jack, for which J. W. Jack was surety. Several other liens followed in their order. This was the situation when execution process was issued on the first lien by virtue of which the real estate of J. W. Jack was, on the 3d June, 1916, sold by the sheriff for \$5,200. The sheriff in his return of sale applied out of the purchase-money \$3,645.54 to the judgment held by the Beaver Trust Company, and, without discoverable

reason, awarded the balance of the fund to the party from whom J. W. Jack had acquired title. Upon exceptions filed by the subsequent lien creditors, the court set aside so much of the return, and proceeded to a hearing in which the facts we have heretofore recited were developed. Disallowing entirely distribution to the judgment transferred to the Peoples National Bank by the Monaca Bank, next in order of priority, the court awarded the balance remaining to the subsequent lien creditors in their order and decreed accordingly. The appeal is by the Peoples National Bank from this decree.

It is quite clear that this bank stock, while in the hands of the Peoples National Bank, was as much impressed with its collateral character as when in the hands of the Monaca Bank. When the Peoples National Bank purchased from the Monaca Bank the obligation of the Jacks, it acquired as well, by operation of law, whatever was pledged for its payment, the same to be held and used, however, for no other purpose than that for which it had been originally pledged. A purchase of a debt is a purchase of all the securities for it, whether named or not at the time of the assignment, unless expressly agreed at the time they shall not pass. *Foster v. Fox*, 4 W. & S. 92. On payment of the note by the surety, the latter would be entitled to the collateral. Neither the bank nor its assigns, nor the surety, could use the collateral for other purpose than that for which it had been expressly pledged. It made no difference how many obligations the Peoples National Bank held against J. W. Jack, it was beyond the power of the latter to subject the stock to other collateral liability, to the prejudice of the surety, J. W. Jack, than that for which it was available for the latter's protection. "For a surety," as said in *Hawk v. Geddis*, 16 S. & R. 23, "is entitled to every remedy which the creditor has against the principal, to enforce every security and all means of payment, to stand in the place of the creditor, not only through the medium of the se-

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curety, but even of securities taken without his knowledge. He has the right to have these securities transferred to him, and avail himself of them, though there was no stipulation for that purpose." The application of the proceeds of the sale of this pledged stock to the individual indebtedness of M. L. Jack was a palpable misapprehension. It was applicable to the note that the bank had acquired from the Monaca Bank on which J. W. Jack was surety and no other. The legal effect of this misapplication was to release J. W. Jack from liability on the note pro tanto. In *Neff's App.*, 9 W. & S. 36, the law governing in such cases is thus stated in the opinion by KENNEDY, J.: "So if the creditor releases the principal from the payment of the debt, he thereby releases the surety entirely, but if he release the principal from a part only of it, he only releases the surety pro tanto; and there is not even a shadow of reason why it should be considered a release of any more. So if the creditor give up to the principal, or release a security which he has obtained from him for the whole of the debt, it will operate as a release or discharge of the surety from all liability as such; but if the security released be only for part of the debt, the surety will only be released pro tanto. The ground upon which the relinquishment or negligent losing of a security taken of the principal debtor by the creditor for the whole or part only of the debt is held to be a release of the surety either for the whole or pro tanto as the case may be, is, that the surety upon payment of the debt to the creditors is entitled to the benefit of all securities which the creditor has, that he could have rendered available against the principal debtor, and if any of those securities have become lost, or have become lessened in value, in consequence of the neglect or default of the creditor, the surety's liability to the creditor will be diminished to that extent." In *Holt v. Bodey*, 18 Pa. 207, there is not only a distinct and express reaffirmance of the doctrine

stated in the case above cited, but express authority may there be found for holding that the right of the surety, in such case as we have here, "is transmitted to the surety's creditors where the claim is used so as to dis-appoint their liens." The facts of the present case clearly bring it within these rulings, as the learned judge of the court below held. The Peoples National Bank had a perfectly legal right to sell the pledged stock; but it had no right in law or equity to apply as a credit the proceeds of sale to any other indebtedness than that for which it was originally pledged, namely, that which was represented by the note assigned to it by the Monaca National Bank upon which M. L. Jack was principal and J. W. Jack but surety. As a legal result of its misapplication, J. W. Jack was thereupon discharged as surety to whatever extent he could have made the stock available against the principal debtor. The court finds as a fact that the value of this stock was the full equivalent of the note. This finding is excepted to, but we see no sufficient ground on which to disturb it. The Peoples National Bank bought the stock at its own sale. We see in the subsequent misappropriation of the proceeds, as the court below must have done, quite enough to cast discredit upon the bona fides of the sale. Ordinarily the price obtained for an article in the open market is the best evidence of its value, but there are cases in which it is not the best or only evidence, and this is one of them. What the surety in this case lost was not to be measured by market value at any particular time, but by its value to the surety for his indemnity. The court below held that its real value was sufficient to extinguish the entire indebtedness for which the surety was liable, and the evidence fully warranted the conclusion.

It results, from what we have said, that with the extinguishment of the debt the collateral judgment against the surety fell, and distribution to it was properly refused.

The decree is affirmed.

Helen Frances Young's Adoption.

Adoption—Failure of father to support child—Act of May 28, 1915, P. L. 580—Decree—Consent of mother—Insanity of father—Death of father—Subsequent proceedings by mother to set decree aside—Status of committee—Appeal—Certiorari.

1. By adoption a new status is created which cannot be stricken down because of regret of a parent who consented thereto.

2. A decree of adoption based upon a finding that the father of the child had neglected and refused to support said child for upwards of a year, is presumed to be based on evidence, and will not be set aside on the ground of lack of jurisdiction where the proceedings are before a proper tribunal, and no appeal was taken from the decree of adoption.

3. Whatever right a parent has to the custody of his child terminates at his death, and the committee in lunacy of a parent whose child had been adopted has no right after the death of the parent to join in an appeal from a decree refusing to set aside a decree of adoption.

4. A child whose father had failed to support it owing to ill health, and as the court below found within the meaning of the Act of May 28, 1915, P. L. 580, was adopted by relatives, under a decree of the court, to which the mother consented. The decree was based upon evidence which was not preserved of record. Thereafter the father died and the mother petitioned for the setting aside of the decree, contending that she had consented to the petition for adoption, in the belief that she was merely allowing the adopting parents to educate the child. There was no evidence of any fraud or bad faith on the part of the adopting parents. *Held*, the lower court properly refused to set aside the decree of adoption.

5. An appeal from a decree in an adoption proceeding is in effect a certiorari, and brings up nothing but the record. The Supreme Court cannot review the merits, but is entitled to inspect the whole record with regard to the regularity and propriety of the proceedings, and to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion, and if the proceedings are regular in these respects the appeal will be dismissed.

Argued Oct. 11, 1917. Appeal, No. 103, Oct. T., 1917, by George W. Thompson, Committee of Nelson Young and Frances Thompson Young, from decree of C. P. Al-

574 HELEN FRANCES YOUNG'S ADOPTION.

Statement of Facts—Opinion of the Court. [259 Pa. legheny Co., July T., 1915, No. 2316, refusing to set aside decree of adoption in case of *In re Adoption of Helen Frances Young*. Before MESTREZAT, POTTER, STEWART, MOSCHZISKEB and WALLING, JJ. Affirmed.

Petition to set aside decree of adoption. Before SHAFER, P. J.

The opinion of the Supreme Court states the facts.

The court refused to set aside the decree. George W. Thompson, Committee of Nelson Young and Frances Thompson Young appealed.

Error assigned was the decree of the court.

A. Leo Weil, with him *George W. Johnson*, *Charles M. Thorp* and *L. Pearson Scott*, for appellants.

William A. Challener, with him *Clarence Burleigh*, for appellees.

OPINION BY MR. JUSTICE WALLING, January 7, 1918:

This is a proceeding to set aside a decree of adoption. On June 21, 1915, James B. Laughlin and Clara Y. Laughlin, his wife, residents of Pittsburgh, presented their petition in the usual form to the Court of Common Pleas of Allegheny County, setting forth, inter alia, their desire of adopting as their child one Helen Frances Young, the minor child of Nelson E. and Frances Thompson Young; that the mother had consented to the adoption and that the father had neglected and refused to provide for the child for a period of more than one year next preceding the presentation of the petition, etc. Mrs. Young also formally joined in the prayer of the petition and gave her written consent to the adoption. The court, HON. THOMAS D. CARNAHAN presiding, proceeded to a hearing at which Mr. and Mrs. Laughlin and Mrs. Young were present and examined, and the matter fully considered, at the conclusion of which the court made a

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decree as follows: "And now, June 21, 1915, the foregoing petition presented in open court, and after hearing, it appearing to the court that Nelson E. Young, the father of Helen Frances Young, a minor child, has neglected and refused to support said child for upwards of one year, and that Frances Thompson Young, the mother of said child, has not been guilty of any neglect of said child, and has consented to its adoption by the petitioner, and it further appearing to the court that the welfare of said child will be promoted by the adoption of her by the petitioners, it is ordered and adjudged that said Helen Frances Young shall and do assume the name of Helen Young Laughlin, and have all the rights of an heir and child of said James B. Laughlin and Clara Y. Laughlin, his wife, and be subject to the duties of such child, and the adoption prayed for be and is hereby allowed and granted." The child's father was then in a sanitarium at Cincinnati, Ohio, where he had been a patient from October, 1913, suffering from mental and physical ailments, and where he remained until his death in July, 1916. Previous thereto, in April, 1916, George W. Thompson had been appointed his committee by proceedings in lunacy in West Virginia, where Mr. Young had formerly resided.

Mr. Young was a brother of Mrs. Laughlin, and during his illness was assisted financially by the Laughlins who had ample means. The parties were on terms of intimacy and the child had lived with the Laughlins for some months before the adoption. In the fall of 1915 Mrs. Young became dissatisfied because her wishes as to visiting and receiving visits from the child were not granted. The dissatisfaction culminated in May, 1916, when she and Mr. Young's committee filed a petition in the court below asking that the decree of adoption be set aside; to which petition the Laughlins filed answer and testimony was taken. After careful consideration, the court, in an opinion by President Judge SHAFER, refused the petition. From which order Mrs. Young and the

committee took this appeal. The hearing on the petition to set aside the adoption was had after the death of Mr. Young. It was urged by appellants in the court below and here that Mr. Young's failure to support his child was the result of ill health and not of drunkenness, profligacy or other cause within the meaning of the statute of May 28, 1915, P. L. 580; and, as he had not consented to the adoption, the court was without jurisdiction. There was no record preserved of the evidence submitted to the court in the proceeding for adoption, so we have no accurate knowledge of just what it consisted. The court there finds that the father "has neglected and refused to support said child for upwards of a year." The presumption is that such finding was based on the evidence. The proceedings are regular; it was a matter within jurisdiction of the court; and that was the proper tribunal to determine whether there had been such a neglect and refusal to support as is contemplated by law. The jurisdictional facts were averred and found and no appeal taken therefrom. In our opinion the record discloses nothing that would warrant setting aside the decree of adoption for want of jurisdiction. The father's legal status as a lunatic was not fixed until after the adoption, and he died before the order appealed from was made. His rights terminated at his death; and in our opinion his committee had no authority thereafter to join in the appeal, whatever his rights may have been theretofore. The trust ended by the death of the lunatic: Sec. 41, Act of June 13, 1836, P. L. 592 (Purdon's Digest, Vol. 2, page 2396); and the committee's authority then ceased: *Stobert v. Smith*, 184 Pa. 34.

Mrs. Young is practically the only appellant, and contends that while she signed the adoption petition it was done under a misapprehension and that she never in fact consented thereto, but thought it was a proceeding to enable the Laughlins to educate the daughter, not to have her as their own; and also that whatever she did was the result of their persuasion and undue influence. The

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evidence fails to sustain either contention. The petition for the adoption, her consent thereto and the court's decree are very simple and the matter was fully discussed in open court. The weight of the evidence indicates that this adoption had been well considered. There is nothing to support any claim of fraud or bad faith on the part of Mr. and Mrs. Laughlin. Mrs. Young undoubtedly supposed that she would have the privilege of exchanging visits with the child, which was justified by the previous relations of the parties, although there was no agreement to that effect and that question is not before the court. The adoption seems to have been suitable and for the child's welfare. Mrs. Young's financial condition has improved since that time and she now feels able to care for her child and longs for its companionship. But by adoption a new status was created which cannot be stricken down because of regret of a parent who consented thereto.

Mrs. Young was present in court and heard all the testimony including that as to her husband's neglect and refusal to support the child and joined in the prayer for the adoption, and we agree with the court below that, whatever Mr. Young's rights might be if alive, she cannot question the validity of the adoption on grounds personal to him. The court acted upon the case as presented by Mrs. Young and others and she cannot now be heard to say that the facts were not as then stated: See *Wolfe v. Gordon*, 4 Sadler 307, and note.

An appeal in case of adoption is in effect a certiorari and brings up nothing but the record: *Lewis' App.* (Pa.), 10 Atlantic Repr. 126; *Vandermis v. Gilbert*, 10 Pa. Superior Ct. 570. While in such case we cannot review the merits, yet "we are entitled to inspect the whole record with regard to the regularity and propriety of the proceedings to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion": *Robb's Nomination Certificate*, 188 Pa. 212; *Independence Party Nomination*, 208 Pa. 108; *Franklin Film*

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Mfg. Corporation, 253 Pa. 422; see also *In re Diamond St.*, Pittsburgh, 196 Pa. 254, and *Foy's Election*, 228 Pa. 14. In our opinion the court below did not exceed its jurisdiction or abuse its legal discretion in refusing appellants' petition.

The appeal is dismissed at the costs of the appellants.

**Dzikowska v. Superior Steel Company et al.,
Appellants.**

Workmen's Compensation Law—Injury in course of employment—Interval of leisure while awaiting material—Lighting cigarette—Clothes catching afire—Death—Award—Act of June 3, 1915, P. L. 736.

1. In order to hold an employer liable under the Workmen's Compensation Law of 1915 it is not necessary to show that the injury arose out of the employment. It is sufficient if it occurred in the course of employment, except for injuries intentionally self-inflicted, or caused by an act of a third person intended to injure the workman for reasons personal to him.

2. An employer is liable for compensation for an injury sustained by a workman during a short interval in his work while awaiting the arrival of material with which to work.

3. Acts of ministration by a servant to himself, such as quenching his thirst, satisfying his hunger, and protecting himself from excessive cold, the performance of which while at work are reasonably necessary to his health and comfort, are incident to his employment and acts of service therein within the workmen's compensation acts, although they are only indirectly conducive to the purpose of the employment.

4. An employment is not broken by mere intervals of leisure such as those taken for a meal and if an accident occurs to a workman during such time the employer is liable even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something that is wholly foreign to his employment.

5. It is not unreasonable for workmen to smoke out of doors, during intervals in their work, where it does not interfere with their duties.

6. Where an employee, during an intermission in his work, while

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waiting for material, struck a match for the purpose of lighting a cigarette and as a result his clothing, saturated with oil, by reason of the work in which he was engaged, caught on fire and he was fatally burned, an award of compensation to his dependents was properly made.

Argued Oct. 11, 1917. Appeal, No. 104, Oct. T., 1917, by defendants, from judgment of C. P. Allegheny Co., April T., 1917, No. 1090, dismissing exceptions to decision of the Workmen's Compensation Board, in case of Mary Dzikowska v. Superior Steel Company and Ætna Life Insurance Company. Before MESTREZAT, POTTER, STEWART, MOSCHZISKE and WALLING, JJ. Affirmed.

Exceptions to award of Workmen's Compensation Board. Before EVANS, J.

The opinion of the Supreme Court states the facts.

The court dismissed the exceptions. Defendants appealed.

Errors assigned were in dismissing the exceptions.

John G. Frazer, with him *David A. Reed*, and *Reed, Smith, Shaw & Beal*, for appellants.—The deceased was not engaged in the furtherance of the business of his employer at the time of the accident and his dependents are not entitled to recovery: *Tomkoska v. Pressed Steel Car Co.*, 2 Dept. Rep. (Pa.) 1708; *Peterson v. Davis Lupton's Sons Co.*, 2 Dept. Rep. (Pa.) 841; *Smith v. Lancashire & Yorkshire Ry.*, 1 Queen's Bench 141—1899.

Allan Davis, for appellee.—The deceased was clearly engaged in furthering his master's business at the time of his injury: *Botto et al. v. Hamilton et al.*, Dauphin Co. Rep., 1917, Vol. 20, 57; *Amerzor v. Jones & Laughlin Steel Co.*, 2 Dept. Rep. Pa. 2517; *McManus v. Winter Garden Co.*, 2 Dept. Rep. Pa. 1980; *Chambers v. Woodbury Mfg. Co.*, 106 Md. 496; *Bolden v. Greer*, 2 Dept. Rep. Pa. 2677.

OPINION BY MR. JUSTICE POTTER, January 7, 1918:

This is an appeal by the Superior Steel Company, and the Aetna Life Insurance Company, as insurance carrier, from an order of the Court of Common Pleas of Allegheny County, dismissing exceptions to a decision by the Workmen's Compensation Board, awarding compensation to the widow and minor children of Victor Dzikowska, deceased.

There are five assignments of error, all to the dismissal of exceptions filed by appellants. They raise but one question, which is stated in substantially the same form by counsel for appellants and appellee, the statement of the latter being as follows: "During an intermission in the work of a mill, an employee struck a match supposedly for the purpose of lighting a stogie or cigarette, and as a result his clothing caught fire and he was fatally burned. Was he injured by an accident occurring in the course of his employment, within the meaning of the Workmen's Compensation Act of 1915?"

Section 301 of that Act, June 3, 1915, P. L. 736, provides that when employer and employee shall by agreement, either express or implied, accept the elective compensation provisions of the act, "compensation for personal injury to, or for the death of, such employee, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, ... provided that no compensation shall be made when the injury or death be intentionally self-inflicted." In the same section it is further provided: "The term 'injury by an accident in the course of his employment,' as used in this article, shall not include an injury caused by the act of a third person intended to injure the employee for reasons personal to him, and not directed against him as an employee or because of his employment; but shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere."

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In the case at bar Dzikowska, appellee's husband, with other workmen, was engaged in the shipping room loading steel upon a railroad car. They had loaded all the steel at hand, and were waiting for the arrival of trucks with more steel. Dzikowska wore an apron of burlap, and also had burlap wrapped around his arms for the purpose of protecting him in handling the steel, much of which was oiled, so that his clothing was more or less saturated with oil. He stepped out of the shipping room and went into a box car, supposedly in order to smoke, as he said afterwards that, in striking a match upon his trousers, the burlap apron caught fire. No one saw him at the moment, but directly afterward he ran out of the car all aflame, and was so badly burned that his death resulted in a few days.

In the compensation acts of some of the states, compensation is allowed only for injuries "arising out of and in the course of his employment" thus attaching two conditions to the right to recover. In the Pennsylvania statute, the words "arising out of" do not appear, and we are, therefore, relieved from the necessity of considering the question whether in this case the accident arose out of, or was due to the character of the employment. Under our statute compensation is given for personal injury or death of an employee "by an accident in the course of his employment," and it is further provided that, while the term used shall not include certain injuries caused by acts of third persons, it "shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere."

The fact that, in the present case, Dzikowska met with an accident during a short interval of waiting for the arrival of more material to load, made no difference. His period of employment was not broken thereby. He was discharging precisely the duty laid upon him by his employer, and in the manner expected of him. As the

court below said, "This was not a rest period. It was not a period when, by the rules of the employment, the employee was free from the duties of his employment. It was an indeterminate period of waiting for the occurrence of an event which would renew the active operations of the employment. That might be a minute, or it might be very much more. But the employee had not been called off from work, and, in renewing his work, would not be called back. He was there ready to work as soon as the material was ready for his hand." What we regard as a sound statement of the principle involved, appears in 1 Honnold on Workmen's Compensation, Section 111, as follows: "It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time, there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something that is wholly foreign to his employment. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compensation acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade."

Nor do we regard the fact that the accident resulted from his striking a match for the purpose of enabling him to smoke at that time and place, as being sufficient to debar him and his dependents from the benefits of the

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statute. It is not unreasonable for workmen to smoke out of doors, during intervals of work, where it does not interfere with their duties. And in this instance the foreman testified that he did not interfere with the men when they were smoking outside of the building, but he did not allow smoking inside.

The evidence showed that the burlap apron worn by Dzikowska for the purpose of protecting his clothes while he was working, which was soaked with oil from the steel, first caught fire from the match and the flames communicated to the burlap wrappings on his arms, worn for the same purpose, and also oil soaked. If he had not worn these wrappings, or if they had not become unusually inflammable by reason of the work in which he was engaged for his employer, the accident would probably not have occurred. It is not unusual for men to strike matches on their trousers, without thought of danger. The peril in the present case arose, or was at least greatly increased, by the use of burlap wrappings worn for the purposes of the workman's employment, and their inflammable condition resulted directly from that employment. Dzikowska was, of course, negligent in striking the match upon his oil soaked clothes. But, under the Workmen's Compensation Act of 1915, contributory negligence on the part of the workman is not a defense. The employer is liable for accidents in the course of employment, except for injuries "intentionally self-inflicted," or caused by an act of a third person intended to injure the workman for reasons personal to him.

The assignments of error are overruled, and the judgment is affirmed.

Kann, Appellant, v. Kann.

Contracts—Debt and interest—Payment on account—Application of payment to principal—Case for jury.

1. Except where otherwise agreed a payment made on an in-

debtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to interest due and then to principal.

2. A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses, provided the payment is a voluntary one.

3. While a debtor, after making payments, may not demand their application to principal as against interest, yet he may so stipulate in making a payment, and if it is accepted without immediate protest such acceptance will be tantamount to an agreement to apply the money as directed, the creditor being bound accordingly. After an appropriation has been made by the debtor and expressly or impliedly assented to by the creditor, the law will not interfere on behalf of the latter, upon equitable or other grounds, for such circumstances constitute a contractual situation, and courts will not set aside agreements unless they are without consideration, illegal, against public policy, made without contractual capacity, or induced by fraud, accident or mistake of fact.

4. Not decided whether a creditor, when partial payment is made on a debt, coupled with a request or direction to apply the amount to the principal rather than to the accrued interest, has a right at once to refuse so to do.

5. Defendant was indebted to plaintiff and made two payments, one \$4,000 and the other \$1,000, on account. When defendant paid plaintiff the latter sum he explicitly directed in writing that it should be applied to the principal and in the same letter expressed the wish that the sum of \$4,000, previously paid, should be likewise applied. Plaintiff acknowledged receipt of the \$1,000, noting that it was to be appropriated to the principal; but objected to a like application of the \$4,000. The jury found specially that the \$4,000 payment had been properly applied by plaintiff to interest, but that the \$1,000 had been correctly applied on the principal, and rendered a general verdict on that basis upon which judgment was entered. *Held*, no error.

Argued Oct. 15, 1917. Appeal, No. 138, Oct. T., 1917, by plaintiff, from judgment of C. P. Allegheny Co., July T., 1915, No. 435, on verdict for plaintiff in case of W. L. Kann v. M. M. Kann. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. *Affirmed*.

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Assumpsit on account stated. Before CARPENTER, J.

The facts appear by the opinion of the Supreme Court.

Verdict for plaintiff generally for \$1,845.95 with special findings that the \$4,000 payment was properly applied on interest and the \$1,000 payment should be applied on principal. Plaintiff appealed.

Errors assigned were rulings on evidence, answers to points, and the charge of the court.

Edward Schreiner, of *Schreiner & Loeffler*, for appellant, cited: *Roberts' App.*, 92 Pa. 407; *Miller v. Leflore*, 32 Miss. 634; *Johnson v. Robbins*, 20 La. Annual 569.

Leonard S. Levin, for appellee.—A debtor may appropriate his payments as he sees fit at the time he makes them. If he makes no appropriation the creditor may make it on one or more of several obligations; if neither the debtor nor creditor makes an appropriation, then the law will make one as to the debts oldest in point of time: *Risher v. Risher*, 194 Pa. 164; *Pardee v. Markle*, 111 Pa. 548; *Souder v. Schechterly*, 91 Pa. 83; *Harmony Creamery Co. v. Bickerton*, 57 Pa. Superior Ct. 651; *Christman v. Martin*, 7 Pa. Superior Ct. 568; *Logan v. Mason*, 6 W. & S. 9.

While the cases above cited do not involve the question of principle and interest, yet they have to do with the right of the debtor to appropriate payments and they indicate the trend of the policy of the law in this State.

OPINION BY MR. JUSTICE MOSCHZISKER, January 7, 1918:

Appellant states the following "question involved": "Can a debtor in making payment on account of indebtedness specifically apply the payment to principal, when the interest at the date of payment exceeds the payment; or does the law make the application in such a case to interest, so as to prevent any application by the debtor?"

Fully to cover the question presented by the record before us, however, this statement should include not only the fact that defendant debtor expressly directed the voluntary payment in controversy to be applied on principal, but also the further fact that plaintiff creditor accepted the money on this understanding.

As a result of the rulings of the court below upon the law relevant to the point at issue, the plaintiff recovered somewhat less than his full claim, and, being dissatisfied with the amount of the verdict and judgment entered thereon, he has appealed. Appellant contends that a debtor has no legal right to direct a payment made by him to be credited on principal, when the interest then due exceeds the amount of the payment; hence that, under such circumstances, the creditor may retain the sum paid and appropriate it to interest, notwithstanding a different application may have been directed by the former and at the time expressly or impliedly agreed to by the latter.

In disposing of a motion for a new trial, the court below states: "It is contended that the law, not the payor, makes the application, and that defendant's direction was of no force or effect. With this contention I cannot agree. The parties were of full age and could make any agreement they saw fit; if the payment was in fact made on account of the [principal] debt, and if with that knowledge plaintiff retained the check, he cannot now apply the money otherwise." We concur in this conclusion.

Roberts' Appeal, 92 Pa. 407, 421, contains dicta which lends some support to appellant's contention, but there is no ruling in that case which controls the present one. *Miller v. Leflore*, 32 Miss. 634, 635, 644, and *Johnson v. Robbins*, 20 La. Annual 569, 570, are also called to our attention by the appellant; but both of them might with greater propriety have been cited by the appellee, for in neither instance did the debtor give any direction for a special appropriation of the payments there under con-

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sideration. Moreover, in the first of these cases, where one suit was brought on several notes, upon all of which interest had accrued, it was held that undirected payments, made by the debtor to the creditor, must be applied, not in liquidation of the accrued interest upon all the notes, but, "first to the interest accrued on the note first falling due, and the balance of such payment to the principal of said note, and so on, in the order in which the notes were payable"; which ruling certainly does not help the present appellant. In the next case the court states, "Where there is interest due, a debtor cannot, without the consent of the creditor, impute to the reduction of the principal any payment he may make"; the plain implication being that, where the creditor assents, the rule is otherwise.

Pindall v. Bank of Marietta, 37 Va. 481, 484, and *Miller v. Trevilian*, 2 Robinson's Reports (Va.) 1, 27, cases cited by appellee, both rule that "a debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal, in exclusion of the interest; and the creditor, if he receives it, is bound to apply it accordingly"; finally, the last of these cases contains an interesting discussion, beginning at page 28 of the report, as to the effect of this rule, to show that a creditor is not harmed by its application.

The following generalizations touching the question before us are furnished by 30 Cyc. At p. 1249: "Except where otherwise agreed, a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to interest due and then to principal [citing, *inter alia*, *Moore v. Kiff*, 78 Pa. 96; *Spires v. Hamot*, 8 W. & S. 17; *Bell's App.*, 4 Sadler 423]." See also *Bower v. Walker*, 220 Pa. 294, 297; *Buck v. Mutual B. & L. Assn.*, 49 Pa. Superior Ct. 128; *Com. to use of Bellas v. Vanderslice*, 8 S. & R. 452-458; *Penrose v. Hart*, 1 Dallas 378. At p. 1228: "A debtor paying money to his creditor has the

primary and paramount right to direct the application of his money to such items or demands as he chooses [citing, *inter alia*, *Watt & Co. v. Hoch*, 25 Pa. 411, 413; *Harker v. Conrad*, 12 S. & R. 301, 304], provided the payment is a voluntary one [see *Pa. Co. v. Clausen Brewing Co.*, 3 *Sadler* 408]; for example, the debtor may apply the payment to principal to the exclusion of interest." At p. 1231: "Where a debtor directs the manner in which his payment is to be applied, the creditor, if he accepts the payment, must apply it accordingly [citing, *inter alia*, *Smuller v. Union Canal Co.*, 37 Pa. 68; *Martin v. Draher*, 5 *Watts* 544, 545; *Jamison v. Collins*, 11 *Philadelphia* 258, *MITCHELL, J.*]." At p. 1232 (notes): "If the debt consists of both principal and interest and the debtor directs the payment to be applied on principal, or it is mutually agreed that the payment shall be so applied, the creditor, after receiving it, cannot apply the payment to interest [citing *Tooke v. Bonds*, 29 *Tex.* 419, 427, 428; *Pindall v. Marietta Bank*, 10 *Leigh (Va.)* 481]." Another note at p. 1232 states that payment by draft is as good as money to bind the creditor to the payor's appropriation (citing *Moorehead v. West Branch Bank*, 3 *W. & S.* 550), and a further note on the same page says that "a refusal to return drafts after explicit direction as to their application will be regarded as an election to accept them for the purpose for which they were offered," citing *Christman v. Martin*, 7 *Pa. Superior Ct.* 568. At p. 1240: "Payments by the debtor will be applied according to the intention of the parties where that can be determined with reasonable certainty [citing, *inter alia*, *Stewart v. Keith*, 12 *Pa.* 238; see also *Smith v. Mould*, 149 *N. Y. Supp.* 552, 553]; and the court will not generally exercise the power of appropriating payments when an appropriation has already been made by either debtor or creditor [citing, *inter alia*, *Watt & Co. v. Hoch*, 25 *Pa.* 411; *Selfridge v. Northampton Bank*, 8 *W. & S.* 320]."

In general, the court will make the application only in

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the event that both parties have failed to do so (*Feldman v. Gamble*, 26 N. J. Eq. 494; *Seymour v. Marvin*, 11 Barb. 80; *Hilton v. Sims*, 45 Ga. 565); and an agreement as to the appropriation controls: *Shaw v. Pratt*, 39 Mass. (22 Pick.) 305, 308; *Larkin v. Watt*, 32 S. W. (Texas) 552, 555; *Genin v. Ingersoll*, 11 W. Va. 549, 559, 560. Where the parties, or either of them, have rightfully applied a payment, it is final, and the law will not interfere therewith: *Mercer v. Tift*, 79 Ga. 174; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 270; *Selfridge v. Northampton Bank*, 8 W. & S. 320. Ordinarily, interest is considered as incidental to or forming an integral part of the principal debt upon which it accrues, and not as a separate demand (22 Cyc. 1570, 1571; *Osterling v. Allegheny Trust Co.*, decided at this term); but, when a payment is made on account of the debt, there is nothing to prevent the parties from mutually treating interest as a demand separate and apart from the principal, so as to appropriate the payment to the latter rather than the former, if they see fit. When this course is pursued, the rules laid down in the authorities dealing with the application of payments as between separate debts, have relevancy; hence their notation here. While it may be that none of the cases cited actually governs this one, and that, perhaps, some of the broad principles to which we call attention may have no direct bearing on the exact point now before us, nevertheless they all shed more or less light upon our present inquiry.

The question raised by the record at bar has not been directly passed upon in any Pennsylvania case which our research has disclosed, and there are but few reported decisions upon the precise point in other jurisdictions. From an examination of the cases already mentioned it appears that, while a debtor, after making payments, may not demand their application to principal as against interest, yet he may so stipulate in making a payment, and, if it is accepted without immediate pro-

test, such acceptance will be tantamount to an agreement to apply the money as directed, the creditor being bound accordingly. The principle that, after an appropriation has been made by the debtor and expressly or impliedly assented to by the creditor, the law will not interfere on behalf of the latter, upon equitable or other grounds, has been frequently announced (*Stewart v. Keith*, 12 Pa. 238; *Martin v. Draher*, 5 Watts 544; *Pearl v. Clarke*, 2 Pa. 350); for such circumstances constitute a contractual situation, and courts will not set aside agreements unless they are without consideration, illegal, against public policy, made without contractual capacity, or induced by fraud, accident or mistake of fact. The present case does not fall under any of these classifications, and the alleged inequity of holding this creditor to the application which, when the payment in question was made, he at least impliedly agreed to, is not so strong as to move a chancellor to avoid the resulting contract and release plaintiff from its effect; and the learned court below did not err when it so ruled.

It may be well here to state that the trial of this case involved a controversy as to the proper application of two different funds, one of \$4,000 and the other of \$1,000. When defendant paid plaintiff the latter sum, he explicitly directed in writing that it should be applied on principal, and, in the same letter, he expressed the wish that the sum of \$4,000, previously paid, should be likewise applied. Plaintiff acknowledged receipt of the \$1,000, noting that it was to be appropriated to principal, and, in his letter so doing, he discussed defendant's suggestion for a like application of the \$4,000, saying in that connection, "What I can't see at the present time, without giving it much consideration, is how you can apply a payment on principal, as long as the interest is running against the debt; interest should be paid before the principal." The verdict of the jury, which is in the nature of special findings, correctly determined that the \$4,000 fund had been properly applied to interest, but

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that, under the circumstances, the \$1,000 (being the payment now in controversy) must be applied on principal. They also found that the original contract between the parties required defendant to pay plaintiff interest at the rate of five per cent. These findings are justified by the evidence at bar and they breach no established rules of law; thereunder, since the original contract expressly required the payment of interest, no issue arises on the question discussed in some of the cases, upon the general subject now before us, concerning the right, in the absence of such an agreement, subsequently to recover accrued interest on a principal sum which had previously been paid off (see 22 Cyc. 1572-4; 15 R. C. L. 11, 14, 15); and, again, since the evidence shows, and the jury in effect found, a contract on the part of plaintiff to appropriate the \$1,000 to principal, the abstract question of the right of a creditor, when partial payment is made on a debt, coupled with a request or direction to apply the amount to principal rather than accrued interest, at once to refuse so to do, is not before us for determination. On the facts here disclosed, what we do determine is that, at the time of the payment in question the defendant having explicitly directed its application to principal, and the plaintiff having accepted the money without declining to abide by this direction, the jury were justified in finding it had been complied with and that the appropriation thus made created a contractual relation or situation which subsequently could not be changed by one of the parties without the consent of the other; hence, as expressed in the verdict, the \$1,000 must be applied on principal.

The assignments of error are overruled and the judgment is affirmed.

Commonwealth v. Weber, Appellant.

Criminal law—Statute of limitations—Misdemeanors—Flight—Return—Concealment within State—Act of March 31, 1860, P. L. 427-450, Sec. 77—"Usual resident"—Words and phrases—Tolling of statute—Seduction—Promise to marry—Evidence—Sufficiency—Charge—Case for jury.

1. One who is charged with a crime committed in a rural district and flees from arrest to another state but subsequently takes up his residence in a large city within the State and lives under his proper name, may be denied protection of the statute of limitations by disavowing his identity at times for the purpose of evading arrest.

2. The words "usual residence" within the meaning of the Act of March 31, 1860, P. L. 427-450, Section 77, requiring that all indictments for misdemeanors shall be brought within two years, provided "that if the person against whom the indictment shall be brought or exhibited, shall not have been an inhabitant of this State, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution. . . . such indictment shall and may be brought. . . . against such person at any time within a similar space of time during which he shall be an inhabitant of or, usually resident within the State," do not refer only to defendant's place of residence but also to his manner of residence; "usual" when used in this sense means "customary" or "common"; to be a "usual resident" one must conduct himself in accordance with his customary mode of life.

3. One might commit an offense and move to another part of the State in an open manner, or even go from the State, if in military service, and not be barred from claiming the benefit of the statute of limitations, but this is not so where the offender flees from justice and subsequently by fraud and concealment, succeeds in avoiding arrest.

4. Where a person indicted in 1916 for the crime of seduction committed in 1910, pleaded the statute of limitation, it appeared that defendant left the State on learning that a warrant had been issued for his arrest; that no accurate account of his whereabouts thereafter appeared until 1913, when he took up his residence in Pittsburgh where he continued to reside until arrested; that since 1913 he worked at his trade as carpenter in different parts of that city, used his proper name there and received mail from the general delivery and at his various boarding houses, and paid taxes

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and voted in the district where he resided; that while a resident of Pittsburgh he frequently visited the rural district in which the crime was committed but on such occasions he denied his identity and used an assumed name, and that when arrested he denied his identity. *Held*, there was sufficient evidence to warrant a finding that defendant was not a "usual resident" of the State and that the statute of limitations should therefore be tolled, and the case was for the jury and a conviction in such case will be sustained.

5. If defendant had moved openly to Pittsburgh immediately after the commission of the crime for the bona fide purpose of taking up his residence there, he would have been a "usual resident" within the meaning of the statute.

6. Circumstantial evidence of an engagement of marriage is to be found in the proof of such facts as usually accompany that relation; among them may be mentioned letters, presents, social attentions of various kinds, visiting together in company, preparations for housekeeping, and the like.

7. In a prosecution for seduction, evidence that defendant had been paying constant attention to prosecutrix for practically one year, that they became engaged to be married about three months after they first met, at which time he gave her a ring; that defendant called on her at least once a week for several months, accompanied her in public, and on one occasion repaired the engagement ring, sufficiently corroborated statement of prosecutrix that defendant promised to marry her.

Argued Oct. 15, 1917. Appeal, No. 143, Oct. T., 1917, by defendant, from judgment of Superior Court, April T., 1917, No. 151, affirming judgment of Q. S. Allegheny Co., Sept. Sessions, 1916, No. 739, on verdict of guilty of seduction in case of Commonwealth v. Charles Weber. Before BROWN, C. J., MESTREZAT, POTTER, STEWART, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Appeal from Superior Court. Opinion by WILLIAMS, J.

The facts appear by the opinion of the Supreme Court and in Com. v. Weber, 67 Pa. Superior Ct. 497.

The Superior Court affirmed the judgment of the Quarter Sessions Court. Defendant appealed,

Assignment of Error—Opinion of the Court. [259 Pa.

Error assigned, among others, was the judgment of the Superior Court.

George H. Quail, for appellant.—The evidence was not sufficient to sustain a conviction of seduction: *Rice v. Commonwealth*, 102 Pa. 408.

Defendant was an "inhabitant" and "usual resident" within the meaning of the Act of 1860: *Graham v. The Commonwealth*, 51 Pa. 255; *Blackman v. Commonwealth*, 51 Pa. 255; *Blackman v. Commonwealth*, 124 Pa. 578.

R. H. Jackson, District Attorney, with him *E. R. Jackson*, Assistant District Attorney, *J. D. Hern* and *Denis Æ. Behen*, for appellee.—The evidence amply corroborated the promise of marriage: *Rice v. Commonwealth*, 100 Pa. 28.

Defendant was not a "usual resident" of the State: *Commonwealth v. Blackburn*, 3 Pa. C. C. 464; *Blackman v. Commonwealth*, 124 Pa. 578; *Commonwealth v. Wilson*, 18 Pa. Dist. Reports 38; *Commonwealth v. Smith*, 19 Pa. C. C. 397; *Commonwealth v. Bates*, 1 Pa. Superior Ct. 223.

OPINION BY MR. JUSTICE FRAZER, January 7, 1918:

Defendant appeals from a judgment of the Superior Court (67 Pa. Superior Ct. 497) affirming the judgment of the Court of Quarter Sessions of Allegheny County in which defendant was indicted and convicted for seduction and fornication and bastardy. The principal question for determination is whether or not defendant was an inhabitant or usual resident of this Commonwealth for a period of two years previous to his indictment within the meaning of Section 77 of the Act of March 31, 1860, P. L. 427-450, requiring all indictments for misdemeanors to be brought within two years, provided "that if the person against whom such indictment shall be brought or exhibited, shall not have been an inhabit-

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ant of this State, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution as aforesaid, then such indictment shall and may be brought or exhibited against such person at any time within a similar space of time during which he shall be an inhabitant of or, usually resident within this State."

The offense was alleged to have been committed in West Deer Township, Allegheny County, in July, 1910, at which time defendant was a resident of that township. An information was sworn to April 7, 1911, and a warrant issued, but owing to defendant's absence was not executed. An alias warrant issued in April, 1912, likewise could not be served, and on July 6, 1916, defendant was arrested on a pluries warrant issued in February, 1913, and indicted September 22, 1916. As to the main facts there is no controversy. Defendant left home on learning a warrant had been issued for his arrest, going to Youngstown, Ohio, and no accurate account of his whereabouts thereafter appears until November, 1913, when he took up his residence in Pittsburgh and continued to reside in that city until arrested. For a time he had quarters at a small hotel, subsequently removing to a boarding house, and has continuously since 1913 lived in boarding houses in various parts of the city, and according to his testimony has been outside the County of Allegheny but twice in three years. During that period he worked at his trade as a carpenter, being employed in that capacity for a time in a department store in Pittsburgh, and at other times in different parts of the city. While so employed he appeared in public, lived under his proper name, received mail through the general delivery at the post office and at his various boarding houses, paid taxes and voted in the district where he resided. It is in fact conceded he was an inhabitant of the State for a period sufficient to bring him within the protection of the statute of limitations. The question is, was he also a "usual resident" of the State

within the meaning of that expression as used in the act, or was the statute tolled by reason of various acts of concealment committed by defendant during the two-year period preceding his indictment.

While a resident in Pittsburgh, defendant "off and on" usually "over Sunday" visited his old home in West Deer Township, where he owned an interest in a farm. On these occasions attempts were made to arrest him, but upon inquiry his relatives stated they were unable to give information as to where he could be found. On several occasions he hired a horse and buggy at a livery stable in a borough adjacent to the City of Pittsburgh, to drive to West Deer Township and attempted to conceal his identity by using an assumed name, and denying he was Charles Weber upon being recognized by the livery stable keeper. He also denied his identity when arrested. The trial judge charged that if defendant lived in Pittsburgh under his proper name without attempting to disguise or conceal his identity he must be acquitted; if, however, he endeavored to conceal his identity he was not a usual resident of the State within the meaning of the statute.

It thus appears the exact question raised is whether one charged with crime committed in a rural district who flees from arrest, but subsequently takes up his residence in a large city within the State, where he lives under his proper name, can be denied the protection of the statute by disavowing his identity at times for the purpose of avoiding arrest.

In *Graham v. Commonwealth*, 51 Pa. 255, it was stated the proviso to the section of the act in question was meant for persons escaping and absenting themselves to avoid punishment until the lapse of time might enable them to return with impunity. In *Blackman v. Commonwealth*, 124 Pa. 578, the trial judge charged that if the jury found defendant left the county for the purpose of avoiding arrest and remained away under circumstances which baffled all efforts made to find him, he might be convicted regardless of whether his place of

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concealment was within or without the State. In that case no evidence having been offered on behalf of defendant it was held the Commonwealth made out a prima facie case by proving defendant had fled from his usual place of residence within the State for the purpose of avoiding arrest and could not be found within the State, hence proof that defendant concealed himself outside the State was unnecessary. The court said (page 583): "If the defendant was hiding within the State instead of outside of it, it was a fact peculiarly within his own knowledge, and he was a competent witness to prove it. Had he done so, he would have been in a position to raise the question, whether a fugitive from justice who effectually secretes himself within the State, and thus baffles all attempts to arrest him until the statute has run, can then emerge from his hiding place and successfully plead the statute of limitations. We will decide such question when it is fairly raised. The language of the learned judge below upon this point, whether accurate or not, did the defendant no harm."

The question here involved was disposed of by the Superior Court in the following language: "The words 'usual resident' do not refer to defendant's place of residence, but to his manner of residence. 'Usual,' when used in this sense, means 'customary' or 'common': *Graham v. Com.*, supra, at page 258. To be an 'usual resident,' therefore, one must conduct himself in accordance with his customary mode of life. One might commit an offense and move to another part of the State in an open manner, or even go from the State, if in military service, and not be barred from claiming the benefit of the statute: *Graham v. Com.*, supra; but this is not so where the offender flees from justice and, subsequently, by fraud and concealment, succeeds in avoiding arrest. Unless we so construe the act the words 'usual resident' become meaningless. If the offender lives outside of the State he is a nonresident, and if he remains in hiding or concealment within the State he is an 'inhabitant,' but

not an 'usual resident.' The question is primarily one of fact, and was properly submitted to the jury."

While it must be conceded the acts of concealment in this case were not numerous, they were committed at times and places when danger of apprehension was greatest, which were when defendant visited his former residence in West Deer Township. Had he removed openly to Pittsburgh for the bona fide purpose of taking up his residence there a different situation would be presented. His original departure from the State was not to take up a bona fide residence elsewhere but for the purpose of avoiding arrest. Such acts are not consistent with those of a "usual resident" of the State, and one who thus actively takes steps to avoid arrest has no just cause for complaint when the jury is permitted to infer from such circumstances that he was not a "usual resident" within the meaning of the statute of limitations.

The remaining question is the sufficiency of the evidence to corroborate the prosecutrix's testimony concerning the promise of marriage, as required by Section 41 of the Act of March 31, 1860, P. L. 427-440. Defendant had been paying constant attention to prosecutrix for practically one year and they became engaged to be married about three months after they first met, at which time he gave her a ring. The principal evidence relied upon to corroborate her testimony as to the promise of marriage was the fact that she wore the ring given her by defendant, that defendant called on her at least once a week for several months, took her to church and other places, and on one occasion repaired the engagement ring. Defendant contends this was not sufficient evidence of corroboration to submit to the jury, and relies upon the case of *Rice v. Commonwealth*, 100 Pa. 28, and the same case reported on retrial in 102 Pa. 408. There it appears from the opinion of this court in 100 Pa. 28, page 32, that "The attentions from which the jury were permitted to infer a promise of marriage were of an equivocal character. The plaintiff in error had been in

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the house of the prosecutrix but four times, according to her own statement and that of her mother, and then only for a short time. He met her out in the evenings, sometimes at church, walked home with her, and left her at the gate. This is not the kind of intercourse that usually takes place between persons engaged to be married. It may tend to matrimony, but is quite as likely to lead to something else. Circumstantial evidence of an engagement of marriage is to be found in the proof of such facts as usually accompany that relation. Among them may be mentioned letters, presents, social attentions of various kinds, visiting together in company, preparations for housekeeping, and the like. These and similar circumstances, especially when the attentions are exclusive and continue a long time, may well justify a jury in finding a promise of marriage."

On the second trial of the case evidence submitted by the Commonwealth was practically the same as on the former trial and it was held, reversing the judgment of the court below, that the evidence was not sufficient to submit to the jury on the question of corroboration. In the present case the proof was more substantial than was that in *Rice v. Commonwealth*, and sufficiently corroborated prosecutrix, within the rule therein stated, to warrant its submission to the jury.

The judgment is affirmed.

Dewar v. Carson et al., Appellants.

Deeds—Building restrictions—Building line—Covenants—Construction—Intention—Restricted space—Lowering grade—Erection of poles—Laying of street railway tracks—Bill in equity—Injunction.

1. While building restrictions are enforceable, they are not favored by the law, and covenants relating to them are not to be extended by implication.

2. Words contained in a building restriction in a deed are to be interpreted in the light of the manifest object or purpose of the

parties in using them. The meaning and extent of the building restrictions which were within the contemplation of the parties at the time it was imposed must prevail.

3. Where the deeds to a number of lots abutting on a street in a residential district provide that "no dwelling house or other building of any kind shall ever be erected or placed on said lot within twenty feet" of the street and that "a space of twenty feet shall always be open and clear of buildings or parts of buildings whatsoever" and the owners by a supplemental agreement duly recorded, increase the space to forty feet and covenant with each other "not to build or erect or suffer to be built or erected a building of any character whatever" in such space, a street railway company which has purchased two of the lots will be enjoined from lowering the grade of its lots within the restricted space and erecting poles and laying tracks thereon for a loop, on which street cars of large dimensions would pass or stand during any hour of the day or night.

Argued Oct. 16, 1917. Appeal, No. 147, Oct. T., 1917, by defendants, from judgment of Superior Court, April T., 1917, No. 195, reversing decree of C. P. Allegheny Co., Oct. T., 1916, No. 1733, dismissing bill in equity for injunction in case of John Dewar v. W. B. Carson, Pittsburgh Railways Company, The Federal Street & Pleasant Valley Passenger Railway Company, and George R. Bothwell and John Carson, Partners, trading as Bothwell & Carson. Before BROWN, C. J., POTTER, MOSCHZISKER, FRAZER and WALLING, JJ. Affirmed.

Appeal from the Superior Court. Before ORLADY, P. J.

The facts appear by the opinion of the Supreme Court and in 67 Pa. Superior Ct. 527.

The Superior Court reversed the decree of the lower court dismissing the bill. Defendants appealed.

Error assigned, among others, was the decree of the Superior Court.

Edwin W. Smith, with him *Reed, Smith, Shaw & Beal*, for appellant.—Building restrictions should not be extended by implication: *Crofton v. St. Clement's Church*,

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208 Pa. 209; McCloskey v. Kirk, 243 Pa. 319; St. Andrew's Lutheran Church's App., 67 Pa. 512; Gilmore v. Times Publishing Co., 18 Pa. Superior Ct. 363; Landell v. Hamilton, 175 Pa. 327; Asbury v. Carroll, 54 Pa. Superior Ct. 97; Nowell v. Boston Academy, 130 Mass. 209; Van Banman v. Gallagher, 182 Pa. 277; Appeal of State Society of Cincinnati, 154 Pa. 621.

M. W. Acheson, Jr., of *Sterrett & Acheson*, for appellee.—The purpose of the building restriction in question was to preserve the residential district of the parties from the intrusion of business: *Landell v. Hamilton*, 175 Pa. 327; *Prendergast v. Walls*, 257 Pa. 547.

The permanent putting together of materials on the land for any use creates a "building": *The Long Eaton Recreation Grounds Co. v. Midland Ry. Co.*, 2 Law Reports K. B. Div. 574; *Luhman v. New York W. & B. Ry.*, 142 N. Y. S. 860; *Clement's Administrator v. Putnam*, 35 Atl. Repr. 181; *McGillick v. Hasley*, 16 Pa. Dist. Reports 44; *Mecca Realty Co. v. Kellogg Co.*, 85 Misc. (N. Y.) 598; *Wright v. Evans*, 2 Abbotts Practice Reports N. S. 308; *Swasey v. Shasta County*, 141 Cal. 392; *Pennsylvania Steel Co. v. Potts Salt & Lumber Co. et al.*, 63 Fed. 11.

OPINION BY MR. CHIEF JUSTICE BROWN, January 7, 1918:

John Dewar and the Pittsburgh Railways Company are the owners of adjoining lots situated on the north side of California avenue, in the City of Pittsburgh. The frontage of the Dewar ground is one hundred and fifty feet and that of the railways company one hundred feet. The properties extend one hundred and forty feet northward to an alley. They form part of a duly recorded plan of lots, and the title to each of them is subject to the following covenant and condition running with the land, as part of the consideration therefor: "The above described lots of ground are conveyed by the party of the

first part, and purchased and accepted by the party of the second part, for himself, his heirs and assigns, subject to the covenant and condition running with the land, and part of the consideration hereof, that no dwelling house or other building of any kind, shall ever be erected or placed on said lot within twenty feet of the line of California avenue, but that a space of twenty feet, as aforesaid, shall always be left open and clear of all buildings, or parts of buildings whatsoever"; and then follows a provision authorizing any owner or owners of property located on the plan to proceed in any court of law or equity, by injunction or otherwise, to enforce the performance of the covenant or restrain its violation. On October 16, 1894, before the railways company acquired title, its grantor and other owners of lots in the same square entered into an agreement, which was duly recorded, changing the building line from twenty feet to a uniform distance of forty feet from the north line of California avenue. The bill filed by the complainant was for an injunction to restrain the railways company from violating the building restriction imposed upon its lots. Its declared purpose, as found by the court below at the time this proceeding was instituted, was "to grade said lots 39 and 40 to the approximate level of California avenue and Wynhurst street, and to place thereon, in the form of a loop, tracks over and along which cars may be operated and allowed to stand; said tracks to be laid on ties supported by ballast, and said cars to be operated in the usual manner, by the use of poles, wires and electricity." The grade to which the railways company proposed to reduce its lots is approximately eight feet below the natural elevation of them and the adjoining lots. The bill was dismissed on the ground that what the railways company proposed to do was not in violation of the building restriction. On appeal to the Superior Court this was reversed, and the bill was reinstated with a *procedendo*, that court having been of opinion that the proposed action of the railways company would be in viola-

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tion of the restriction: *Dewar v. Carson et al.*, 67 Pa. Superior Ct. 527. From this the railways company has appealed.

While building restrictions are enforceable, they are not favored by the law, and covenants relating to them are not to be extended by implication: *St. Andrew's Lutheran Church's App.*, 67 Pa. 512; *Crofton v. St. Clement's Church*, 208 Pa. 209; *McCloskey v. Kirk*, 243 Pa. 319. The error into which the learned court below fell was in holding that the covenant in the railways company's deed would be extended by implication if it should be restrained from erecting or placing railroad tracks, rails, poles and ties on its lots. Under the pleadings and proofs, the question was not one of extending a covenant by implication, but was as to the meaning to be given to its express terms. The covenant in the railways company's deed, read in connection with the agreement of October 16, 1894, is that the space of forty feet north from the line of California avenue "shall always be left open." These words are to be interpreted in the light of the manifest object or purpose of the parties in using them: *Meigs v. Lewis*, 164 Pa. 597; *Landell et al. v. Hamilton et al.*, 175 Pa. 327; *Murphy v. Ahlberg et al.*, 252 Pa. 267; and the meaning and extent of the building restriction which were within the contemplation of the parties at the time it was imposed must prevail.

In view of three findings of the court below, which were not excepted to there, and cannot, therefore, be disturbed here, clear error was committed in dismissing plaintiff's bill. After describing his lots and those of the defendant, the court proceeded to find as follows: "Both of said properties are in a residence district." "In said forty-foot strip upon said lot next the plaintiff's said property and commencing about seven or eight feet westwardly therefrom, the defendant, Pittsburgh Railways Company, proposes to install tracks (consisting of rails, ties and ballast), poles about twenty feet high

above ground, and a system of wires for electric traction, together with street cars eleven to twelve feet high and forty-five feet long, which, with and without passengers, are to be hauled by said railways company over said tracks day and night and also stored thereon." "By means of the requirement that all buildings or parts of buildings shall be forty feet back from the street, the parties to said restriction, for themselves, their heirs and assigns, sought to protect and preserve the lots in said plan (including those now belonging to the parties to this suit), for residential purposes." The situation is thus concisely and aptly summed up by the learned president judge of the Superior Court: "The improvement contemplated by the defendants involves a material change of the surface grade, a permanent erection of solid materials, poles and wires, netted together to be used as a part of a general street system, and the occupancy of the surface tracks by cars in motion or at rest according to the will of the owner, and with such frequency as their business requires." To permit the railways company to install on the front of its lots "tracks (consisting of rails, ties and ballast), poles about twenty feet high above ground, and a system of wires for electric traction, together with street cars eleven to twelve feet high and forty-five feet long, which, with and without passengers, are to be hauled by said railways company over said tracks day and night and also stored thereon," would defeat the very purpose of the building restriction, which, as found by the court below, was "to protect and preserve the lots for residential purposes." This is too plain for further comment, and that portion of the lot shall, in the words of the covenant, "always be left open," in the sense in which the parties to the covenant used them, "to protect and preserve the lots for residential purposes."

The assignments of error on this appeal are overruled, and the decree of the Superior Court is affirmed, at the cost of the appellants.

Griffith, for use of Crownover, et al., Appellants, v. McKeever.

Real property—Merger—Dower interest—Assignment of dower interest to owner in fee—Mortgages—Assumpsit for dower.

1. Whenever a greater estate and a less meet in the same person, the less is merged or drowned in the greater.

2. Merger is a question of intent and will not take place against the wishes of the party to be affected by it, and where it is against the interest of the person holding the respective titles, the law will not presume an intent to merge.

3. Where the owner of land, subject to dower and also to a mortgage to secure the payment of the dower interest, subsequently acquired the dower interest, and thereafter conveyed the premises subject to the mortgage as part of the consideration money, a merger of the dower and the fee took place, and the personal representative of such grantor could not maintain an action of assumpsit for the dower against the grantee of the land, although the amount due was not in dispute; in such case the plaintiff's remedy was upon the mortgage.

Argued Sept. 27, 1917. Appeal, No. 22, Oct. T., 1917, by plaintiffs, from judgment of C. P. Westmoreland Co., Nov. T., 1915, No. 254, for defendant n. o. v., in case of Ida M. Griffith, who was assignee of Mary E. Brinker, now deceased, now for use of M. W. Crownover and A. W. Crownover, administrators of the Estate of J. C. Crownover, deceased, v. J. L. McKeever. Before MES-
TREZAT, POTTER, STEWART, MOSCHZISKER and FRAZER, JJ. Affirmed.

Assumpsit for dower.

DOTY, P. J., filed the following opinion:

McKeever, the defendant, is the owner of a tract of land in Penn Township, by virtue of a deed dated November 22, 1905, and duly recorded in deed book 400, page 17. This deed contains the following clause: "This conveyance is made subject to a certain mortgage upon said premises in favor of Mary E. Brinker, widow of

Josiah Brinker, deceased, and Sarah M. B. Miller, recorded in the Recorder's Office of Westmoreland County in Mortgage Book 45 page 315." Prior to the conveyance to McKeever, the said tract of land had been made subject to the payment of a dower interest to Mary E. Brinker. One J. C. Crownover by deed December 6, 1898, became the owner in fee of the said tract of land, and by deed dated December 12, 1898, he likewise acquired title to the dower estate. Both estates were thus vested in Crownover until February 15, 1900, when he made a conveyance of the fee. The deed to Crownover and the one to his grantee were made subject to the payment of a certain mortgage conditioned for the payment of interest on the sum of \$3,295.84 annually to Mary E. Brinker, widow of Josiah Brinker, deceased, during her natural life and at her death to pay the said principal sum, to wit, \$3,295.84 to the said Sarah M. B. Miller, which mortgage is included in the consideration money aforesaid.

The suit is in assumpsit to recover installments of dower interest which were due and unpaid up until the death of Mary E. Brinker. The suit is brought for the use of the administrators of J. C. Crownover in which, as we have seen, were vested at the same time both the dower interest and the fee simple. The amounts are not disputed, but the defendant contends that in this action he is not liable to pay the installments of dower now due. It is clear that the action of assumpsit would not lie on the mortgage which has been referred to. There is no express covenant to pay. The use of the words "under and subject to the payment of such mortgage" would not alone impose a personal liability upon the defendant, and there is nothing else in the case to show a covenant on his part to pay.

The real question in dispute is: Whether there was a merger of the dower estate in the fee simple? The facts are not contested. Crownover, for the use of whose estate this action is brought, had title to both dower inter-

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est and the fee simple from December 12, 1898, until February 1900, when the fee was conveyed subject to the mortgage already mentioned. The dower interest of the widow was a life estate in the land. Crownover acquired this estate and at the same time was seized of the fee simple. The textbooks lay down the doctrine that whenever a greater estate and a less meet in the same person the less is merged or drowned in the greater. And this doctrine has been consistently applied in the courts of this State: *Kreamer v. Fleming*, 191 Pa. 534.

In *Estate of Fred'k Danhouse*, 130 Pa. 256, it is indicated that there is an exception to the general rule as to merger, the court declaring in the opinion, p. 260, that: "Merger is a question of intent and will not take place against the wishes of the party to be affected by it; and, where it is against the interest of the person holding the respective titles, the law will not presume an intent to merge." In the case in hand we can conceive of no interest in Crownover that would be adversely affected by a merger. There is nothing on the record to show that it was against his wish or consent, but the fact that he conveyed subject to the mortgage securing to the same persons the same amounts of money to be paid under proceedings in partition, seems to show that it was recognized that the estates were merged and that the assignee of the widow's interest and the distributee were to be protected by the new security.

It is conceded that there is only one indebtedness. The mortgage and the recognizance in partition are intended to secure the identical amounts to the same persons. This debt has never been paid. It was made part of the consideration in the conveyance to McKeever the defendant herein, the deed to him containing the provisions that: "This conveyance is made subject to a certain mortgage upon said premises in favor of Mary E. Brinker, widow of Josiah Brinker, deceased, and Mrs. Sarah M. B. Miller, recorded in the recorder's office of Westmoreland County in mortgage book 45, page 315," etc.

Opinion of Court below—Opinion of the Court. [259 Pa. The suit here is not on this mortgage and an action of assumpsit would not lie thereon against the terre-tenant, if we are to be guided by Hollenberger v. Yankey, 145 Pa. 179. But the law affords a remedy for the collection of the unpaid balance of the purchase-money. The whole dispute here seems to be about the remedy, as it is admitted that the original debt is unpaid and that the present holder of the title has not paid in full the consideration provided in his deed. But the question that confronts the court is not whether defendant is bound to pay but whether he is liable in this suit. As it seems clear that the two estates were merged as already explained, it follows that an action of assumpsit cannot be maintained against the present holder of the title, and as there are no facts in dispute it also follows that defendant is entitled to judgment non obstante veredicto.

Verdict for plaintiffs for \$1,658.44.

The court subsequently entered judgment for defendant n. o. v. Plaintiffs appealed.

Error assigned was the judgment of the court.

John E. Kunkle, for appellants.

George W. Flowers, for appellee.

PER CURIAM, January 7, 1918:

The judgment is affirmed on the opinion of the learned court below entering judgment for defendant non obstante veredicto.

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ADOPTION.

1. *Failure of father to support child—Act of May 28, 1915, P. L. 580—Decree—Consent of mother—Insanity of father—Death of father—Subsequent proceedings by mother to set decree aside—Status of committee—Appeal—Certiorari.*

By adoption a new status is created which cannot be stricken down because of regret of a parent who consented thereto.

A decree of adoption based upon a finding that the father of the child had neglected and refused to support said child for upwards of a year, is presumed to be based on evidence, and will not be set aside on the ground of lack of jurisdiction where the proceedings are before a proper tribunal, and no appeal was taken from the decree of adoption.

Whatever right a parent has to the custody of his child terminates at his death, and the committee in lunacy of a parent whose child had been adopted has no right after the death of the parent to join in an appeal from a decree refusing to set aside a decree of adoption.

A child whose father had failed to support it owing to ill health, and as the court below found within the meaning of the Act of May 28, 1915, P. L. 580, was adopted by relatives, under a decree of the court, to which the mother consented. The decree was based upon evidence which was not preserved of record. Thereafter the father died and the mother petitioned for the setting aside of the decree, contending that she had consented to the petition for adoption, in the belief that she was merely allowing the adopting parents to educate

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the child. There was no evidence of any fraud or bad faith on the part of the adopting parents. *Held*, the lower court properly refused to set aside the decree of adoption.

An appeal from a decree in an adoption proceedings is in effect a certiorari, and brings up nothing but the record. The Supreme Court cannot review the merits, but is entitled to inspect the whole record with regard to the regularity and propriety of the proceedings, and to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion, and if the proceedings are regular in these respects the appeal will be dismissed. *Helen Frances Young's Adoption*, 573.

AFFIDAVIT OF DEFENSE, see Practice, C. P.

APPEALS.

1. *Certiorari—Adoption—Failure of father to support child—Act of May 28, 1915, P. L. 580—Decree—Consent of mother—Insanity of father—Death of father—Subsequent proceedings by mother to set decree aside—Status of committee. Helen Frances Young's Adoption*, 573.

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1. *Privileged communication—Banks and banking—Bank deposits—Transactions outside of usual banking hours—Liability of bank—Evidence—Entry in bank's books. Gonder v. Farmers Nat. Bank, 197.*

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1. *Errors due to conduct of appellant's counsel—Assignments of error—Defective assignments—Practice, Supreme Court—Appeals. Murray v. Smith, 518.*

2. *Improper conduct—Breach of fidelity to court—Misbehavior in office—Charge of prejudice against judges—Remarks in argument in Federal Court for removal of cause from Common Pleas Court—Privilege—Constitution of United States, Sec. 2, Art. III—Act of Congress of March 3, 1911.*

A court has power to strike the name of a member of the bar from the roll for official misconduct in or out of court, irrespective of where the misconduct occurs. A state court may disbar one of its attorneys for misconduct committed in a Federal Court or in any other State court.

The purpose of Art. III, Sec. 2, of the Constitution of the United States extending to the Federal courts jurisdiction in controversies between citizens of different states, was to secure for controversies between citizens of different states a tribunal independent of local influences and surroundings, whether the question for determination are of fact or law, and it was in pursuance of such purpose that the Act of Congress of March 3, 1911, 36 Stat. 1094, was passed, providing that a defendant in a suit in a state court may remove it to the proper Federal court at any time before the trial thereof, if it shall appear to said court that he will not, from prejudice and local influence, be able to obtain justice in the State court.

The right of removal from a State court, on the ground of local prejudice, is not confined to prejudices which may affect a jury but extends to those which may influence a judge.

The test as to whether remarks made by an attorney in derogation of the judges of a Common Pleas Court during the course of an argument for the removal of a cause to the Federal courts on the ground of local prejudice, constitute misbehavior in his office as attorney is not whether the words spoken are true, but whether they were spoken in the course of a judicial proceeding and were relevant or pertinent to the subject or cause of inquiry.

A statement made by a member of the Luzerne County Bar in the United States District Court during the course of an

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argument in support of a rule to remand to the former court a cause which had been removed to the district court, to the effect that "the five judges of the Luzerne court are so prejudiced that (the defendant) could not get a fair trial in our courts," was privileged, since the act of congress required his client to show that prejudice existed in order that the cause be removed, and what was said was relevant and pertinent to the subject of the inquiry and was supported by affidavits; and an order suspending such attorney from office for six months was reversed. *Sherwood's Investigation*, 254.

AUTOMOBILES.

1. *Negligence—Railroads—Contributory negligence—Guest—Testing danger. Vocca v. Penna. R. R. Co.*, 42.

2. *Negligence—Standing trolley car—Alighting passenger passing around front of car—Collision with automobile between opposite bound tracks—Speed—Failure to blow horn—Cutting in front of street car—Contributory negligence—Case for jury.*

No one can complain of want of care in another where care is rendered necessary only by his own wrongful act.

In an action against the owner of an automobile to recover for personal injuries the question of defendant's negligence and the contributory negligence of the plaintiff were for the jury and a verdict and judgment for the plaintiff will be sustained, where it appeared that plaintiff, after alighting from the front of a street car, which had stopped at a crossing, passed around in front of the car and had taken about two steps beyond it when he was struck in the space between the east and west bound tracks by defendant's automobile heading in the same direction as the car; that the automobile approached at a greater than usual rate of speed at that place without sounding its horn and just before striking plaintiff changed its course, running in close to the front end of the car in an effort to pass in front of it. *Oelrich v. Kent*, 407.

BANKS AND BANKING.

1. *Bank deposits—Transactions outside of usual banking hours—Liability of bank—Evidence—Entry in bank's books—Attorney and client—Privileged communication.*

At the request of a depositor in a bank, who desired to transfer certain funds on deposit in the savings department of the bank to her husband, the cashier of the bank went to the home of the depositor to arrange the transfer. He prepared a receipt for \$701.20, which the depositor signed. The cashier

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entered credit in the pass book of the depositor's husband for \$701.20, and on the books of the bank entered a withdrawal of \$701.20 from the account of the depositor. No money was paid to the cashier at the home of the depositor. He withdrew from the bank the amount of the receipt and misappropriated it. In an action by the husband of the depositor against the bank for the amount misappropriated, the lower court decided that the bank was liable. *Held*, no error.

In such case it was not error to refuse to permit the bank to offer in evidence its loose-leaf ledger sheet showing the omission of the item, as the bank could not relieve itself from paying money because its officers failed to make a proper entry on its books.

Where an item of \$1,500 was withdrawn from plaintiff's account by the cashier without any evidence that he was authorized to make such withdrawal, the jury was properly instructed to allow the plaintiff to recover the amount thereof.

Where another item of \$3,000 was withdrawn by the cashier from the plaintiff's account, the fact that he deposited with the papers in the bank a receipt signed by himself, for the plaintiffs did not establish the agency of the cashier for the withdrawal of the fund or justify the submission of the question of the agency of the cashier to the jury.

In such case the exclusion of the bank's ledger sheet showing the withdrawal of such items of \$1,500 and \$3,000 was not error, as the bank could not escape the payment of the money by showing that it had charged the plaintiff with such withdrawals in the absence of evidence of authority for such charge.

It was not error to refuse to permit an attorney who had had a conversation with plaintiff in the presence of the cashier after his relation with the bank had terminated, to relate such conversation where it appeared that the witness was counsel for the plaintiff and that the conversation was privileged. **Gonder v. Farmers Nat. Bank**, 197.

2. Deposits—Failure to demand deposit within thirty years—Payment to State—Depositor's right against State—Contract subject to statute—Acts of April 17, 1872, P. L. 62, and May 11, 1909, P. L. 519—Validity—Affidavits of defense—Insufficient averments—Const. of U. S. 14th Amendment—Const. of Penna., Art. I, Sec. 10, and Art. III, Secs. 16 and 21—Property rights—Payment of money by State without appropriation—Limitation of action against corporation. **Com. v. Dollar Savings Bank, 138.**

BENEFICIAL ASSOCIATIONS.

1. Insurance companies—Distinction—By-laws of society—Death benefits—Failure to include by-laws in certificate—Evidence—Unauthorized circular by officer—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7—Case for jury.

A controlling test as to whether an organization is a beneficial association or an insurance company is whether the organization comes within the definition of the Act of April 6, 1893, P. L. 7, which declares that a fraternal beneficial association is a corporation, society or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries and not for profit, "and in which the payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member."

A society organized as a social institution with a provision for insurance not as a means of profit but in the exercise of a benevolent and fraternal purpose, and governed through a branch system with a form of initiation, requiring that an applicant can be admitted to membership only after investigation and report by the board of trustees of the branch, and a favorable ballot by the members present at a regular meeting, and requiring that the designation of beneficiaries be limited to relatives or dependents of the member, or to a charitable institution of which he may be an inmate, and stipulating that no member may belong to two branches of the association at the same time, is a beneficial association and not an insurance company.

The Act of May 11, 1881, P. L. 20, providing that where an insurance policy refers to the constitution and by-laws of the insurer as forming part of the insurance contract, such constitution and by-laws shall not be admissible in evidence unless a copy thereof be attached to the policy, applies to insurance companies and not to beneficial associations.

In an action against such organization by the wife of a member, the statement of claim averred that plaintiff's husband had left home and had not been heard of for a period of more than seven years, and that the presumption of his death had therefore arisen. The by-laws of the association provided that "no time of absence or disappearance of a member, without proof of actual death, shall entitle his beneficiary, family or next of kin to receive any part or portion of the said fund," except only where the disappearance had been for a period of twenty years. The trial judge excluded the application for membership, the medical certificate and the constitution and

BENEFICIAL ASSOCIATIONS—continued.

by-laws of the association on the ground that these papers were not printed in or attached to the certificate as required by the Act of May 11, 1881, P. L. 20, relating to insurance companies. *Held*, (1) the defendant society was a beneficial association and not an insurance company, (2) the evidence referred to was improperly excluded, and (3) the court erred in giving binding instructions for the plaintiff.

In such case a circular issued by the grand secretary of the defendant without the proper authority of the organization, may be admissible as tending to modify or contradict some of the testimony of that official, but is not admissible as affecting the purpose or character of the defendant.

Ogle v. Barron, 247 Pa. 19, followed; *Marcus v. Heralds of Liberty*, 241 Pa. 429, distinguished. *Lafferty v. Supreme Council Cath. Mut. Ben. Assn.*, 452.

BONDS.

1. *Injunction—Receivers—Affidavit—Protection of property—Acts of March 21, 1806, 4 Sm. L. 326; May 6, 1844, P. L. 564, Sec. 1, and June 16, 1836, P. L. 784—Equity Rules 81 and 82. Baur v. Wilkes-Barre Light Co.*, 115.

2. *Official bonds—Municipalities—Default—County auditors—Audit—Failure to appeal—Sureties—Liability for defalcation of principal—Judgment for defendant. Snyder v. Berkey*, 489.

3. *Production of bond—Defenses—Evidence—Practice, Supreme Court—Question not raised below—Mortgages—Foreclosure—Assignment. Anderson v. Kern*, 81.

4. *Return of bonds—Sale of guardians' bonds registered in ward's name—Failure of purchaser to make inquiry—Liability of purchaser to ward—Equity—Decree—Accounting—Trusts and trustees—Guardian and ward—Embezzlement. Hamilton v. Peoples Nat. Bank*, 220.

BOROUGHES.

1. *Contracts—Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Practice, C. P.—Act of July 26, 1913, P. L. 1374—Jurisdiction, C. P.—Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness. St. Clair Boro. v. T. & P. Elec. Ry. Co.*, 462.

2. *Eminent domain—Parks—Appropriation of land—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus—Courts—Power over process.*

BOROUGH—*continued.*

Any court having jurisdiction to hear and determine civil cases has control over its own processes of execution, but such power may not be exercised arbitrarily but only when sufficient legal reason is shown for the court's interference.

The right of boroughs to appropriate land for park purposes is purely statutory and can be exercised only as the terms and conditions of the statutes have been complied with.

Under Sections 3 and 4 of the Act of May 14, 1915, P. L. 812-412, giving boroughs the right to appropriate land for public park purposes, a borough will not be liable for the value of land appropriated where the value of such land exceeds one and one-half mills on the dollar of valuation of all property, offices, professions, and persons in the borough upon which county taxes are rated and levied, except as the appropriation is approved by a majority vote of the borough.

Land appropriated by a borough ordinance for park purposes exceeded in value one and one-half mills on the dollar of the valuation of all property, offices, professions, and persons in the borough, and such appropriation was not approved by a majority of the borough electors. The borough was without funds to pay the amount of the award, from which no appeal had been taken and upon which judgment had been entered. The persons whose land had been taken issued a mandamus execution against the borough. At the instance of the borough the court made an order directing the borough to pay on account of the award "annually such an amount as will not exceed a total of one and one-half mills on the dollar, in three years, calculated on the basis of the valuation of property in said borough at the rate as may from time to time be assessed for county purposes," the apparent purpose of such order being to make the writ effective for only so much in any one term of three years as the defendant borough could have been compelled to pay had the indebtedness incurred not been in excess of one and one-half mills on the dollar of the assessed valuation of the borough. *Held*, (1) the question of the appropriation of the property not having been submitted to the electors of the borough, the ordinance making the appropriation imposed no liability upon the borough, and the judgment was not ripe for final process to enforce its payment, (2) while it would not be in the power of the court to strike such judgment from the record the court has power to open such judgment for purposes of defense and in the present case it would be a clear abuse of discretion not to do so, and

BOROUGHS—*continued.*

(3) the execution should be vacated and set aside. **Vickroy v. Ferndale Boro.**, 321.

3. *Street railways—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches—"Switches"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough—Laches—Acquiescence—Ratification—Bill in equity—Injunction.*

Laches may be imputed to the Commonwealth or to a municipality as well as to an individual.

Where the tracks of a street railway company have occupied a township road pursuant to authority of the township supervisors for a period of fourteen years, at the end of which time a borough was erected embracing the road in question, the fact that the railway's right to occupy the road was not challenged until twelve years thereafter, is strong evidence of acquiescence on the part of the borough authorities.

The manner in which the consent of so elementary an organization as a township, where it is requisite, is given, is not so important as that the fact of its being given should clearly appear. Although action should be taken by means of a formal resolution, duly recorded in the minutes of the meeting, nevertheless, where the consent of the supervisors is evidenced by a written instrument duly signed and acknowledged by them, their failure to have a minute of the transaction entered upon their records cannot operate to invalidate the consent.

Though the obtaining of a municipality's consent to occupy any of its streets be a condition precedent to the lawful exercise of the power to do so by a railway company, nevertheless where the consent has not been obtained in advance, there may be a subsequent ratification.

While strictly speaking a switch is a mechanical arrangement of movable parts of rails for transferring cars from one track to another, the word is commonly used as a synonym for siding and turnout.

The rule that, even were not expressly given, the right to build switches and sidings is included as a necessary incident to the grant of the right to build a railroad, is applicable to street railways as well as to steam railroads.

Borough authorities may exercise reasonable control over the manner in which switches are laid or sidings constructed.

Switches and sidings should be laid so as to cause the least possible inconvenience to traffic, and if there be any irreconcilable controversy upon this subject, a court of equity will have

BOROUGHs—continued.

jurisdiction to determine what is a reasonable occupancy of the street under the circumstances.

On the hearing of a bill in equity brought by a street railway company to enjoin a borough from interfering with the laying of switches connecting complainant's tracks in the highway with its car barn, it appeared that a township in 1890 granted authority to complainant to lay "a single or double track railway with the necessary sidings, turnouts and switches," and to maintain, operate and use such railway on a certain road within its limits. In 1904 a borough was created including such road within its limits. In 1905 the company paved part of the street on either side of its tracks at considerable cost. In 1916 the railway attempted to lay switches, wholly on the cartway of the street and on its own sidewalk, from its main tracks to an abutting lot on which it had erected a car barn. The borough authorities denied the right to construct such switches and threatened to prevent its exercise. *Held*, (1) the complainant company had the right and authority to lay sidings and switches, and (2) the decree of the lower court dismissing the bill was reversed, the bill reinstated and the record remanded with directions that an injunction be issued.

In such case the fact that after the borough was incorporated it widened the road by adding five feet upon either side is immaterial.

Breen v. Pittsburgh, Harmony, Butler & New Castle Ry. Co., 220 Pa. 612, distinguished by the fact that there the rights of an abutting owner were affected. *Pittsburgh Ry. Co. v. Carriek Boro.*, 333.

BURDEN OF PROOF.

1. *Nonsuit—Evidence—Leading question—Negligence—Railroad crossings—"Stop, look and listen"—Presumption—Contributory negligence.* *Walton v. Penna. R. R. Co.*, 372.

2. *Presumption—Opening judgments—Discretion of court—Rule to strike off judgment—Laches—Res adjudicata—Judgments—Judgment notes—Alleged alteration—Addition of seal—Evidence.* *Bowman v. Berkey*, 327.

BY-LAWS.

1. *Of beneficial society—Failure to include by-laws in certificate—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7—Case for jury—Beneficial association—Insurance companies—Distinction—Death benefits.* *LaFerty v. Supreme Council Cath. Mut. Ben. Assn.*, 452.

CHARGE OF COURT.

1. *Failure to request—Contracts—Suretyship—Coal lands—Receipts—Explanation—Evidence—Legal effect of receipt—Admission in pleadings—Excessive verdict—Motion for new trial.* **Pittsburgh Block Coal Co. v. Oliver Coal Co.**, 290.

CHURCH LAW.

1. *Church property—Dedication to certain purposes—Diversion—Equity—Injunction—Judgment in prior suit—Res adjudicata—Estoppel.*

The estoppel of a judgment extends only to a question directly involved in the issue and not to any incidental or collateral matter however it may have arisen and been passed upon.

A decree in equity determining the right of a congregation to discharge a rector, under a contract which he had violated, does not bar a subsequent suit between members of the same congregation relating to the control of the church property, and it is not material that certain findings in the prior suit are not consistent with certain findings in the second suit, where the questions involved in such findings were merely incidental to the main questions at issue.

A congregation was incorporated in 1901 for the purpose of maintaining a place of worship according to the faith, doctrine, discipline, government and forms of the United Greek Catholic Church. Until 1914 the congregation adhered to the faith and practiced the ritual of the United Greek Catholic Church. In 1914 the congregation employed a priest who belonged to the Orthodox Greek Catholic Church and who began to preach the dogmas and perform the ceremonies of such denomination, so that a large number of the members forsook the charter purposes of the congregation, and practiced in the church the worship and forms of the Orthodox Greek Catholic Church, excluding from the church premises those who adhered to the United Greek Catholic Church. A suit had been brought against this Greek Catholic Church and prosecuted to judgment, involving the right of the congregation to discharge its priest for violation of contract. In a suit in equity brought by the members of the congregation who adhered to the United Greek Catholic Church to enjoin the members in control from using the church property for the practice of the worship and forms of the Orthodox Greek Catholic Church, the lower court decided that the property had been acquired for the purpose of practicing the worship and forms of the United Greek Catholic Church and that it was impressed with a trust for

CHURCH LAW—*continued*.

that purpose; that the prior suit was not *res adjudicata*; and awarded the relief prayed for. *Held*, no error. **Kicinko v. Petraska**, 1.

CITIES.

1. *Councilmen—Disclosure of interest—Quo warranto—Act of June 27, 1913, P. L. 568.*

A writ of quo warranto issued under the provisions of Section 9, Article IV, of the Act of June 27, 1913, P. L. 568, Sec. 9, providing for the ousting of councilmen who should vote without disclosing any personal or private interest in the measure voted upon, was held properly quashed, where all that appeared was that the councilmen in question had voted for a tenant as janitor of a municipal building and that the tenant was at the time of the election indebted to him for rent. **Com. v. Strickler**, 60.

COAL.

1. *Coal lands—Receipts—Explanation—Evidence—Legal effect of receipt—Excessive verdict—Motion for new trial—Charge of court—Failure to request—Contracts—Suretyship. Pittsburgh Block Coal Co. v. Oliver Coal Co.*, 290.

COAL LEASES, *see* Leases.

COMMISSIONS.

1. *Executors and administrators—Joint will—Surcharge—Failure to file account. Springer's Estate*, 46.

CONSTITUTIONAL LAW.

1. *Constitution of United States, Fourteenth Amendment—Constitution of Pennsylvania, Article I, Section 10; Article III, Sections 16 and 21—Property rights—Payment of money by State without appropriation—Limitation of action against corporation—Banks and banking—Deposits—Failure to demand money within thirty years—Payment to State—Depositor's right against State—Contract subject to statute—Act of April 17, 1872, P. L. 62—Validity—Act of May 11, 1909, P. L. 519—Affidavit of defense—Insufficient averments.*

Every sovereign state has jurisdiction to take charge of apparently abandoned or unclaimed property.

The Act of April 17, 1872, P. L. 62, providing that "where any depositor with any savings fund, savings institution or savings bank whatsoever, or his legal representatives, shall

CONSTITUTIONAL LAW—*continued.*

omit to make any demand for the amount deposited by him, or for any part thereof, for the space of thirty years after the last deposit or payment was made by or to him". . . . such funds shall be paid by the bank to the State and thereafter the depositor may recover same from the State, does not violate the Fourteenth Amendment of the Constitution of the United States, or the 10th Section of Article I of the Constitution of Pennsylvania in that it deprives a person of property without due process of law, the rights of the depositor being amply protected by giving him a cause of action against the Commonwealth, which, because of its power of taxation, is always solvent and the best of security.

A court will never heed objections to the constitutionality of an act of assembly unless the complainants are affected by the particular feature alleged to be in conflict with the Constitution.

In an action by the Commonwealth against a banking institution to recover deposits in its hands after thirty years have elapsed from the last addition to or payment therefrom it will be presumed, in the absence of an averment to the contrary in the affidavits of defense, that all the deposits in controversy were made subsequent to the passage of the Act of 1872, and that the respective depositors acted with full knowledge of the provisions of said act, and in view of such presumption there is no merit in the contention that the act is defective in failing to provide, as in the case of an escheat, for notice by publication or otherwise to the owner.

In such case the contract of a depositor must be treated as subject to the terms of the Act of 1872, and the proceeding is therefore not an impairment of the obligations of the contract.

The question whether the failure of the Act of 1872 to permit a depositor to claim interest from the State renders the act invalid, can be raised only by the depositor and not by the bank in an action against it by the Commonwealth.

The Act of 1872 is not contrary to Article III, Section 16, of the Constitution of Pennsylvania in that it attempts to authorize the payment of money by the State treasurer without special appropriation. Such provision of the Constitution simply means that the public funds are not to be expended in any way except as directed by the law-making power, and does not intend to prevent the legislature from providing a special fund to be paid out in a designated manner, or to prevent the law-making power from pledging unappropriated funds for the return of moneys taken into the custody of the State under

CONSTITUTIONAL LAW—*continued.*

such act, concerning which the Commonwealth asserts no right or title paramount to that of the original owner.

The Act of May 11, 1909, P. L. 519, does not impliedly repeal the provisions for repayment contained in the Act of 1872.

The Act of 1872 applies to all banking institutions, whether incorporated or otherwise, and is not a statute of limitations but rather an enactment for the protection of a savings bank against liability after it has paid over a deposit to the State treasurer, and such act is not therefor violative of Article III, Section 21 of the Constitution of Pennsylvania in that it prescribes a limitation of time within which an action may be brought against a corporation different from the general laws regulating actions against natural persons. **Com. v. Dollar Savings Bank**, 138.

2. *Constitution of Pennsylvania, Art. III, Secs. 7 and 11, Art. IX, Sec. 7, and Art. I, Sec. 1—Declaration of Rights—Local and special laws—Gratuities—Contractors—Encroachment on judicial prerogatives—Counties—Contracts—Work done under unconstitutional act—Curative act—Constitutionality—Acts of May 11, 1909, P. L. 506, and April 20, 1917, P. L. 91—Statutes—Construction—Bill in equity—Injunction—Dismissal.*

All presumptions must be drawn in favor of the validity of an act and the propriety of the legislative intention.

The courts are loath to hold curative acts to be special or local legislation when they are drawn to apply to all persons, things or subjects affected by the conditions to be remedied.

Where an act relating to counties in terms applies to all counties in the State, it is presumptively a general statute.

Where the legislature has power to enact the substance of the matter covered by a statute which has been declared void because unconstitutional in form, it may subsequently ratify and make legal anything done under the prior void legislation which it might previously have authorized in due form. The authority of the legislature to ratify whatever it might have authorized is beyond question.

The Act of April 20, 1917, P. L. 91, providing that whenever any county has entered into a contract for the construction of a public highway bridge or tunnel and the same has been completed in whole or in part, but (the county) was without power to pay for the work which had been actually done (because the act under which such work was done had been declared unconstitutional), such contract is valid and binding

CONSTITUTIONAL LAW—continued.

on the county to the extent only that such work and construction was done or made prior to the date on which said act was declared unconstitutional, and providing for the payment of such work from the county treasury, is not a local or special law in violation of Article III, Section 7, of the Constitution and is valid.

Sample v. Pittsburgh, 212 Pa. 583, distinguished.

The Act of 1917 does not offend against Article III, Section 11, of the Constitution, prohibiting legislation giving extra compensation to any public officer or contractor after services shall have been rendered or contract made or providing for the payment of any claim against the Commonwealth without previous authority of law, since such act applies to counties and not to claims against the Commonwealth, and makes no provision for extra compensation but merely for compensation for work not paid for.

The Act of 1917 does not treat the obligations with which it deals as gratuities, such as contemplated by the constitutional inhibition in Article IX, Section 7, of the Constitution, but as moral obligations that have ceased to be legal ones merely because of defects in the statute which authorized them.

The legislature may impose a tax to pay the expense of a public improvement which had been made under invalid authority, and an assessment for that purpose, or payment for such improvement from the moneys of the public treasury raised by general taxation or otherwise, is not a taking or deprivation of property, and the Act of 1917 is not therefore violative of Article I, Section 1, of the Constitution.

The Act of 1917 is a curative act and does no more than to effectively authorize (within the restrictions of the statute) what had previously been defectively authorized by the Act of May 11, 1909, P. L. 506, and does not attempt to decide any judicial question, and is not an assumption by the legislature of judicial powers.

County commissioners entered into a contract under authority of the Act of May 11, 1909, P. L. 506, for the construction of a public highway tunnel. Before the completion of the work the Act of 1909 was declared unconstitutional by the Supreme Court by reason of insufficiency of its title. After the passage of the curative Act of April 20, 1917, P. L. 91, a taxpayer's bill was filed to enjoin payment to the contractor for work done on such tunnel prior to the date on which the Act of 1909 was declared unconstitutional, on the ground that

CONSTITUTIONAL LAW—*continued.*

the Act of 1917 was unconstitutional. *Held*, the bill was properly dismissed. **Kennedy v. Meyer**, 306.

3. *Constitution of Pennsylvania—Schedule to the Constitution, Sec. 14—Judicial districts—Designation—Act of April 24, 1917, P. L. 95—Validity.*

Section 14 of the Schedule to the Constitution of Pennsylvania, providing that the general assembly shall at the next succeeding session after each decennial census and not oftener, designate the several judicial districts as required by this Constitution, is mandatory in form, and indicates a clear intention on the part of the framers of the Constitution, and of the people who adopted it, that judicial apportionment acts are to be passed at definitely designated sessions of the legislature.

What the Constitution specifically requires to be done by the legislature at a definitely designated session cannot be done at any other.

It is always to be presumed that the legislature performs the duties enjoined upon it by the Constitution, and when a session immediately succeeding a decennial census is allowed to pass without the enactment of a judicial apportionment act, a fair presumption is that the legislature intended to readopt the existing judicial apportionment for the succeeding ten years. In such case the judicial districts of the State as then constituted must continue until the session next succeeding the next decennial census.

The Act of April 24, 1917, P. L. 95, designating the several judicial districts of the Commonwealth and providing for the election and commission of judges learned in the law therefor, violates Section 14 of the Schedule to the Constitution, in that it was not passed at the next session of the legislature succeeding a decennial census and is void. **Noecker v. Woods**, 160.

4. *Elections—Judges—Orphans' Court judges—Const. of Penna., Art. V, Sec. 25, and Art. VIII, Sec. 2—Constitutional amendments of 1909, P. L. 948—Time of election.* **Buckley v. Holmes**, 176.

CONTRACTS.

1. *Action on several contract—Presumption—Set-off—Joint debt—Affidavit of defense—Insufficient averments—Corporation defendant—Affidavit by person not officer—Insufficiency—Act of May 14, 1915, P. L. 483—Practice, C. P.*

A claim due from plaintiff and others, jointly, cannot be set off in an action of assumpsit brought by plaintiff alone,

CONTRACTS—*continued.*

because to allow such a set-off would compel the latter to pay individually a debt for which he is liable only when called upon jointly with others.

Two or more persons sued jointly may set off a debt due by the plaintiff to any one of them, and one of two joint obligees, with the consent of the other, may use the obligation as an equitable defense in an action by the obligor against one of them alone.

At common law there are three distinct forms of obligations *ex contractu*: (1) joint, (2) several, and (3) joint and several. In an action on the first, it was necessary to sue all the obligors together, or the survivors of them; on the second, the obligors had to be sued separately; but on the third, the plaintiff could elect to sue separately or jointly.

The question whether a contractual promise, made by two or more persons, is joint, several, or joint and several, depends upon the intention of the parties as evidenced by the language employed in the agreement under consideration, the general rule being that, in the absence of an apparent intent to the contrary, such promises are presumed to be joint, and not several, or joint and several.

The Practice Act of May 14, 1915, P. L. 483, providing that affidavits of defense shall be sworn to by the defendant or some person having knowledge of the facts, does not change the requirements theretofore existing for such affidavits when made by agents of corporations, who are not regular officers acting within the scope of their authority.

An affidavit of defense filed on behalf of a corporation is insufficient where it is not made by an officer of the corporation but by a person styling himself as "chief accountant," where there is nothing to show why it is not made by an officer of the corporation, and there is no averment that the affiant had personal knowledge of the facts averred.

In an action on a written contract to recover for natural gas sold defendant company, defendant filed an affidavit of defense, and a supplemental affidavit, averring by way of set-off that prior to the contract in suit the plaintiff and five other persons entered into a written contract with defendant whereby the former sold the latter all the gas from a certain other tract of land, but thereafter diverted such gas belonging to defendant to an amount in value exceeding plaintiff's present claim. The affidavit of defense was made by the chief accountant of the defendant but did not state that he was an officer of the corporation. *Held*, judgment was properly entered for plain-

CONTRACTS—continued.

tiff for want of a sufficient affidavit of defense. *Mints v. Tri-County Nat. Gas Co.*, 477.

2. *Bailment—Written contracts—Purchase-price—Agreement as to purchase-price—Insufficiency—Plaintiff's statement—Quantum meruit.*

A manufacturer of shirts sent a circular to various persons, engaged in the business of trimming windows, offering prizes for designs, and requesting photographs thereof. The owner of certain designs mailed photographs of them to plaintiff, with a formula for making the substance out of which the designs were to be constructed and a notice on the backs of the photographs that the designs were valuable, and that the photographs were to be returned. On the back of one of the photographs was an endorsement that the value of the original design was \$2,000, and on the other photograph that it was worth \$3,000, and that the formula was worth \$5,000. The owner of the photographs wrote plaintiff that if the conditions on the backs of the photographs were acceptable they could use them in their exhibits, otherwise they should return them. The manufacturer replied merely stating that the photographs and letter had been received. The photographs were used in the exhibition were not returned to the owner and were subsequently lost. In an action on an express contract to recover the amount endorsed on the reverse side of the photographs as their value and that of the formula, there was no evidence that defendant's attention was ever drawn to the endorsement or that he ever agreed to pay the amounts therein stipulated. *Held*, (1) the warning contained in plaintiff's letter to defendant was sufficient to indicate that the photographs and formula were valuable and merely bailed to defendant, and defendants are liable for their reasonable worth, if properly declared for, (2) the writing on the back of the photographs and the acceptance and use thereof did not constitute a contract to pay the amount expressed in such writing, and (3) a compulsory nonsuit was properly entered. *Aland v. Olcott, Peabody & Co.*, 364.

3. *Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Practice, C. P.—Act of July 26, 1913, P. L. 1874—Jurisdiction, C. P.—Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness—Boroughs. St. Clair Boro. v. T. & P. Elec. Ry. Co.*, 462.

4. *Contracts for benefit of third person—Beneficiary's right to sue—Evidence—Deeds—Consideration—Parol evidence of different consideration—Witnesses—Competency—Testimony*

CONTRACTS—*continued.*

of surviving party—Act of May 23, 1887, P. L. 158, Sec. 5, Clause e.

To the rule that at common law no one could maintain an action upon a contract to which he was not a party, there are exceptions where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, and where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts and pay the debts of his vendor.

Parol evidence is competent for the purpose of showing that the consideration for the conveyance of real estate is other than that expressed in the deed.

To disqualify a surviving party to a contract from testifying, he must not only be a surviving and remaining party but must have an interest adverse to the right of the deceased party, under the Act of May 23, 1887, P. L. 158, section 5, clause e. It is the adverse interest, not the adverse testimony that disqualifies a witness.

Where a person conveys real estate on the grantee's express oral promise to pay, to a third person, the amount received from the subsequent sale of the property, and thereafter the grantee dies without having fulfilled the promise, the grantor is a competent witness to testify in behalf of the beneficiary's claim against the grantee's estate.

A claimant against a decedent's estate presented evidence that a conveyance of an interest in certain real estate had been made by claimant's mother to decedent in her lifetime on decedent's oral promise that in case she should sell it during her lifetime she would pay the claimant the full amount invested therein by plaintiff's father, and if she did not sell same would bequeath said amount to claimant. The deed recited a valuable consideration, but there was evidence that no actual consideration had been paid. Decedent did not sell the real estate and at her death bequeathed \$1,000 to claimant. Claimant's mother testified as to such oral contract, although the existence thereof was denied by decedent's children, who claimed that at the time of the delivery of the deed there was a default in payment of the money due on a mortgage and that the property was conveyed to prevent foreclosure proceedings. The auditing judge allowed the claim less the amount of the legacy of \$1,000. *Held*, (1) claimant was entitled to recover on the contract, being the only person beneficially interested in the payment of the money, (2) claimant's mother was a competent witness to prove the oral contract as she was not an adverse

CONTRACTS—*continued.*

party, and (3) there was sufficient evidence to sustain the finding of the auditing judge in claimant's favor and the finding will be sustained.

Hoffa v. Hoffa, 38 Pa. Superior Ct. 356, approved. **Edmundson's Estate**, 429.

5. *Contract subject to statute—Acts of April 17, 1872, P. L. 62, and May 11, 1909, P. L. 519—Validity—Affidavits of defense—Insufficient averments—Const. of U. S. Fourteenth Amendment—Const. of Penna., Art. I, Sec. 10, Art. III, Secs. 16 and 21—Constitutional law—Property rights—Payment of money by State without appropriation—Limitation of action against corporation—Banks and banking—Deposits—Failure to demand money within thirty years—Payment to State—Depositor's right against State. Com. v. Dollar Savings Bank*, 138.

6. *Counties—Work done under unconstitutional act—Curative act—Constitutionality—Acts of May 11, 1909, P. L. 506, and April 20, 1917, P. L. 91. Kennedy v. Meyer*, 306.

7. *Debt and interest—Payment on account—Application of payment to principal—Case for jury.*

Except where otherwise agreed a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to interest due and then to principal.

A debtor paying money to his creditor has the primary and paramount right to direct the application of his money to such items or demands as he chooses, provided the payment is a voluntary one.

While a debtor, after making payments, may not demand their application to principal as against interest, yet he may so stipulate in making a payment, and if it is accepted without immediate protest such acceptance will be tantamount to an agreement to apply the money as directed, the creditor being bound accordingly. After an appropriation has been made by the debtor and expressly or impliedly assented to by the creditor, the law will not interfere on behalf of the latter, upon equitable or other grounds, for such circumstances constitute a contractual situation, and courts will not set aside agreements unless they are without consideration, illegal, against public policy, made without contractual capacity, or induced by fraud, accident or mistake of fact.

Not decided whether a creditor, when partial payment is made on a debt, coupled with a request or direction to apply

CONTRACTS—continued.

the amount to the principal rather than to the accrued interest, has a right at once to refuse so to do.

Defendant was indebted to plaintiff and made two payments, one \$4,000 and the other \$1,000, on account. When defendant paid plaintiff the latter sum he explicitly directed in writing that it should be applied to the principal and in the same letter expressed the wish that the sum of \$4,000, previously paid, should be likewise applied. Plaintiff acknowledged receipt of the \$1,000, noting that it was to be appropriated to the principal; but objected to a like application of the \$4,000. The jury found specially that the \$4,000 payment had been properly applied by plaintiff to interest, but that the \$1,000 had been correctly applied on the principal, and rendered a general verdict on that basis upon which judgment was entered. *Held*, no error. **Kann v. Kann**, 583.

8. *Municipal contracts—Township of second class—Water supply—Acts ultra vires—Estoppel—Act of May 25, 1907, P. L. 231.*

Townships of the second class are not properly to be regarded as municipal corporations, nor do they possess the implied powers of such corporations. They are only involuntary quasi corporations standing low in the scale of corporate existence and they can exercise only such powers as are expressly conferred upon them by statute.

One who contracts with the representatives of a municipality, especially with those having the very limited powers of a quasi corporation such as a township, is bound to know the limitations of the powers of those officials in executing the contract.

In an action brought by a water supply company against a township of the second class to recover for the rental of water hydrants, installed under a contract entered into between the water company and the supervisors of the township, in pursuance of the Act of May 25, 1907, P. L. 231, providing that, upon the petition of the owners of a majority of the lineal feet frontage along a highway, the supervisors may contract with water companies for the placing of hydrants along said highway, evidence to show that the petition for the installation of the hydrants was not signed by a majority of the owners abutting upon the highway was erroneously excluded as immaterial, and the trial judge erred in directing a verdict for plaintiff.

In such case the supervisors had no authority to provide water supply for fire protection, except upon the terms and

CONTRACTS—*continued*.

conditions set forth in the statute; the plaintiff was bound to know and recognize the limitations upon the powers of the supervisors and could not invoke the principle of estoppel after the work had been done so as to charge the township with liability therefor, where it appeared that the township as an organic unit received no benefit from the work, but certain individuals only, were benefited.

It seems that, in such case, if the suit had been brought against the abutting owners who received the benefits, they would be estopped from asserting the invalidity of the contract, it having been performed in so far as they were concerned. **Trevorton Water Supply Co. v. Zerbe Twp.**, 31.

9. *Suretyship—Coal lands—Receipts—Explanation—Evidence—Legal effect of receipt—Admission in pleadings—Excessive verdict—Motion for new trial—Charge of court—Failure to request.*

In an action by a lessor of coal lands on a joint bond given by the lessee as principal, and a surety, one of the conditions being for the payment of royalty upon coal actually mined, the controlling question was the effect to be given a certain receipt and the evidence relating thereto. The receipt was given by the plaintiff company to the defendant's president as trustee of insurance money and was in the following form: "Received of [plaintiff's president, naming him] Trustee, One thousand seventy-five Dollars in payment as follows: By direction of Oliver Coal Co. for its account: \$376.27 Bal. Nov. 1912 royalty; \$344.30 on 1912. Minimum under lease, \$279.53 for Jany. 1913 royalty; \$75 for boiler tube cleaner." A fire had occurred on the leased premises and the insurance company paid the amount of the loss by check to the joint order of the lessor and lessee, but before the latter would endorse the check it required a trusteeship to be established with the plaintiff's president as trustee. The receipt in question represented the disposition of a part of the insurance money by the trustee. Plaintiff's president testified that the receipt was given in the office of the president of the defendant company and was drawn up in accordance with the direction of defendant's president, treasurer and general manager, and that the receipt was not intended as a receipt in full, but that at the time it was given there was overdue from the defendant company to the plaintiff \$2,600 for coal actually mined. Under defendant's objection the court admitted in evidence a paragraph of plaintiff's statement setting forth that such amount was due for royalties on coal mined, on the ground that the averments of

CONTRACTS—*continued.*

such paragraph were not sufficiently or specifically denied in the affidavit of defense. *Held*, (1) such evidence was properly admitted, and (2) the receipt was not conclusive against the right of the plaintiff to recover, and the case was for the jury and a verdict for the plaintiff will be sustained.

In such case it could not be successfully contended on motion for judgment non obstante veredicto that the receipt was, at any rate, in full for all coal mined during the month of November, 1912, and that the verdict of the jury included \$500 for royalty on coal mined during that month, and was erroneous to that extent, where it was not clear from the record that the jury included such item in their verdict; if the jury had included such item the proper method for correction thereof was by a motion for a new trial.

In such case the complaint cannot be made that the trial judge did not sufficiently instruct the jury as to the proper effect to be given to the receipt where the question of the effect of the receipt did not appear to have been raised upon trial, and it did appear that plaintiff's counsel presented thirteen points for charge but none of them related to the receipt.

Assignments of error covering questions not included in the statement of questions involved will not be considered on appeal. **Pittsburgh Block Coal Co. v. Oliver Coal Co.**, 290.

10. *Written contract—Subsequent and parol agreement—Advancing time for completing work—Absence of provision as to increased compensation—Quantum meruit for increased cost—Practice, C. P.—Statement of claim—Insufficiency—Affidavit of defense in nature of demurrer—Practice Act of May 14, 1915, P. L. 483.*

The effect of an affidavit of defense in the nature of a demurrer filed under the Practice Act of May 14, 1915, P. L. 483, is to test the sufficiency of the plaintiff's statement, which must be self-sustaining and set out a good cause of action.

The legal effect of writings attached to the pleadings is for the court and cannot be controlled by averments of the parties.

Letters exchanged in confirmation of a verbal agreement will be presumed to correctly state it, especially where they are retained without objection.

A new agreement will supersede an old one so far as they cannot be executed together.

Where a parol agreement entered into subsequent to the execution of a written contract, modifies the latter only in the respect that the work shall be completed at an earlier date, a recovery cannot be had on a quantum meruit for all work

CONTRACTS—continued.

thereafter done on the theory that the original contract has been abrogated.

In an action by a construction company against a railroad company, it was alleged that plaintiff entered into two written contracts with the defendant to construct two sections of a railroad bed for defendant by December 1st. All of the work was completed on time, accepted and paid for. Plaintiff subsequently brought suit on an alleged verbal agreement, made during the progress of the work, and confirmed by letters, contending that such agreement superseded the original contracts. The alleged change was for the completion of the work at earlier dates. November 7th as to one contract, and October 7th as to the other, thereby greatly increasing the cost of construction. The work was not completed on the earlier dates, but on December 1st as to the one contract, and a week earlier as to the other, due to defendant's alleged dilatoriness in furnishing rails required under an independent verbal agreement made subsequent to the main contracts. The alleged new arrangement made no change in the work to be done or the price to be paid, nor did it abrogate a provision for award by defendant's chief engineer, and plaintiff sued on a quantum meruit. From the time of the commencement of the work under the new agreement plaintiff gave notice from time to time that it would expect additional compensation. *Held*, plaintiff's statement was insufficient and judgment was properly entered for the defendant.

Malone & Son v. Philadelphia & Reading R. R., 157 Pa. 430, distinguished. *Robert Grace Cent. Co. v. M. & W. Ry. Co.*, 241.

CORPORATIONS.

1. *Directors—Fight for control—Issuance of stock—Purchase by directors present at meeting—Right of stockholders to participate in issue—Setting aside of issue—Trust—Fraud—Remedy at law—Equity—Jurisdiction—Bill in equity by stockholder—Injunction.*

While the general rule is that a stockholder is not warranted in proceeding as an individual to redress a wrong done to the corporation, without a formal demand and refusal of the corporation to bring proper action, yet stockholders are not required, either in law or in equity, to do a vain or foolish thing, and where the wrongdoers are the majority of the board of directors, who committed the wrong complained of, it is not reasonable to suppose that a demand upon them to bring cor-

CORPORATIONS—*continued.*

porate action would produce results, and under such circumstances stockholders are justified in instituting proceedings in their own name, without first demanding action on the part of the corporate officers.

Where the question of the control of a corporation is involved, the remedy at law for damages for the improper sale of stock is inadequate, and where an averment of fraud on the part of those having management of the company appears, as against the rights or the interest of the stockholders, a court of equity has jurisdiction to inquire into the transaction and make such decree as the circumstances may warrant.

The directors of a corporation stand in the position of trustees for the entire body of stockholders, and while stock owned by a director is his individual property, to be dealt with as he sees fit, yet when he acts in his official position he is acting not merely as an individual but as representative of others and is prohibited from taking advantage of his position for his personal profit or benefit to the detriment of the stockholders whom he represents.

The directors of a corporation are bound to give stockholders notice of a new issue of stock and an opportunity to subscribe for the stock in proportion to their present holdings, although such issue may be long after the business of the corporation was begun; and where the directors fail to give such notice, but purchase the stock themselves for the purpose of gaining control of the corporation, the issue may be set aside at the instance of a stockholder.

In a suit in equity brought by a stockholder of a brewing company on behalf of himself and other stockholders who might join, praying for a declaration that a certain stock certificate issued to a director of the company was invalid, it appeared that the stockholders and directors had been split into two factions, and that a majority of the board of directors owned and controlled only a minority of the stock while the other directors owned or controlled the majority. At a meeting of the board attended by the directors in sympathy with the minority interests, an issue of 250 shares of treasury stock was authorized, in pursuance of which the fifty shares in question were issued to one of the directors present, which gave the directors voting for the issue control of a majority of the stock. No opportunity was given the other stockholders, including the plaintiff, to take up any part of the new issue. Defendants contended that the stock was issued to put the corporation in funds to pay a note which the company had en-

CORPORATIONS—*continued*.

dorsed. There were other assets available for payment of the note. *Held*, (1) the finding that the issue was for the purpose of gaining control of the corporation was amply supported by the evidence; (2) even had there been sufficient reason for the issuance of the new stock, the directors had no right to subscribe therefor without first notifying the stockholders and giving them an opportunity to take up the stock in proportion to their present holdings; (3) under the circumstances, the fact that no previous demand was made by the plaintiffs on the corporation to take action in the matter is immaterial, and (4) the decree granting the relief prayed for was properly entered. **Glenn v. Kittanning Brew. Co.**, 510.

2. *Foreign corporations—Capital—Bonus—Act of May 8, 1901, P. L. 150—Taxation.* **Com. v. Schwarzschild**, 130.

3. *Management by creditors—Sale of assets—Purchase by sole stockholder and president—Alleged fraud—Trusts and trustees—Bill in equity—Dismissal.*

A bill in equity brought by certain creditors of a corporation sought to impose liability on a decedent's estate on the ground that the decedent's acquisition of the assets of the corporation was a breach of the relationship of trust and confidence in which he stood to complainants, and fraudulent. It appears that deceased had been president of the corporation and owner of all its stock. The corporation was placed in the hands of a receiver and thereafter the creditors perfected a plan, in which complainants joined, under which the receiver was discharged and the creditors controlled the company, naming six of its nine directors, and managed its affairs by an executive committee composed of three of the six directors they had appointed. The company was unable to meet its obligations and its securities were sold at public auction, and were purchased by deceased as the highest bidder. The court found on amply sufficient evidence that after the creditors assumed control deceased took no part in the affairs of the company and had no control over them, and that deceased did not procure the sale to be made and possessed no means to prevent its taking place. *Held*, (1) the mere fact that deceased was the sole stockholder did not render the transaction a fraud, (2) no relationship of trust and confidence existed between deceased and complainants at the time of the sale, and (3) the bill was properly dismissed. **McMullin v. Westinghouse Estate**, 281.

4. *Names—Confusion of names—Equity.* **Peoples Trust Co. v. Safe D. & T. Co.**, 62.

CORPORATIONS—*continued.*

5. *Receivers—Appointment—Hostile interest—Removal. Com. v. North Shore R. R. Co., 155.*

6. *Receivers—Payments—Losses—Issue of unauthorized certificates—Surcharge—Payments directed by order of court—Subsequent order—Priority.*

Where a business is being conducted at a loss a receiver cannot take advantage of his position and pay himself in full at the expense of other creditors, as his equity is not superior to theirs.

A receiver may properly be surcharged for the amount paid by him on unauthorized certificates and for the amount expended by him in repayment of money borrowed without authority.

Where the proceeds of unauthorized certificates and notes went into the business, a receiver surcharged therefor has an equitable claim equal to that of other creditors, but is not entitled to priority.

An order of court directing a receiver to continue the business, implies the authority to purchase supplies necessary for that purpose.

A receiver is not personally liable merely because the business may have been conducted temporarily at a loss, especially where he acted in good faith and the loss did not result from his misconduct or negligence.

While a receiver will be held to a rigid accountability, nothing more is required of him than that he act in good faith and exercise the discretion and prudence of ordinarily careful men in pursuits of similar character.

Where an order of court expressly charges the funds in the receiver's hands with the payment of authorized certificates, the payment thereof should be made to the holders prior to the receiver's commission fixed by a subsequent order of court.

Upon exceptions to the report of an auditor to pass upon the account of a receiver, it appeared that the receiver had continued the business under an order of court, that in some months there were losses and in others profits, but that there was a total loss in the conduct of the business during the receivership, the auditor found that some of the expense incurred in closing out the business might have been eliminated by winding up the business at an earlier date, but there was no finding as to the amount of loss thereby sustained, and no sufficient evidence upon which such a finding could have been based. There was no sufficient evidence to indicate want of proper care and attention to the business on the part of the

CORPORATIONS—*continued.*

receiver. *Held*, the receiver was improperly surcharged for the amount of the loss under the receivership.

In such case where the fund for distribution was not sufficient to pay in full all the preferred claims, an order was made directing payment in full of local taxes, expenses of the audit, costs of appeal, counsel fees, payment of certificates authorized by the court, and after the payment of such special claims directing the balance to be distributed to the receiver to apply upon his claim for compensation and for the amount paid a watchman whose appointment had been authorized by the court. **Penna. Eng. Wks. v. New Castle Stamp Co.**, 378.

COUNCILMEN, see Public Officers.

COUNTIES.

1. *Contracts—Work done under unconstitutional act—Curative act—Constitutionality—Acts of May 11, 1909, P. L. 506, and April 20, 1917, P. L. 91—Const. of Penna., Art. III, Secs. 7 and 11, Art. IX, Sec. 7, and Art. I, Sec. 1—Declaration of rights—Local and special laws—Gratuities. Kennedy v. Meyer*, 306.

COUNTY AUDITORS, see Public Officers.

COURTS.

1. *Power over process—Boroughs—Eminent domain—Parks—Appropriation of land—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus. Vickroy v. Ferndale Boro.*, 321.

CRIMINAL LAW.

1. *Murder—First degree—Lying in wait—Evidence—Adverse witness—Cross-examination—Evidence of witness's previous statement—Threats—Ill feeling—Remoteness—Admissibility—Motive—Scope of cross-examination of defendant—Improper remarks of district attorney—Failure to object—Dying declaration—Conflicting declarations—Defenses—Alibi—New trial—After-discovered evidence—Cumulative evidence.*

Where on the trial of a homicide case one of the Commonwealth's witnesses testifies at variance to his previous statement, it is not error to permit the district attorney to cross-examine the witness as to such statement, or to offer testimony as to what his previous statement was, for the purpose of neu-

CRIMINAL LAW—*continued.*

tralizizing the effect of his testimony. The allowance of such permission is largely discretionary with the trial judge.

The remoteness of threats may greatly impair their probative force, but as a rule it does not affect their admissibility.

On the trial of an indictment for murder it is competent for the Commonwealth to show that the defendant had formerly boarded with deceased and during such time there had been trouble between them because of which the deceased had ordered the defendant from his home, although such occurrence was two and a half years previous to the homicide. The remoteness goes to the weight rather than the competency of such evidence.

Great latitude is permissible in the cross-examination of a defendant.

Where a defendant on trial for murder testifies that he had no motive or reason for killing the deceased, the district attorney may ask him questions tending to prove motive, and in that connection to attempt to show that defendant blamed deceased for a wound inflicted upon defendant by a third party, and defendant cannot complain because such examination failed in its purpose, where it does not appear that the district attorney asked the questions in bad faith or that defendant was prejudiced thereby.

It was improper for the district attorney to remark during such examination, "We believe now if this man (the defendant) would answer the questions truthfully we could show that that was the motive for this homicide," but where no objection or exception was taken to such remark at the time, it cannot be made the basis of an assignment of error.

The fact that the court in its charge inadvertently stated that a certain witness testified to certain declarations of the victim, where substantially such testimony had been given by other witnesses but not by the witnesses referred to, is not reversible error where the court's attention was not called to the mistake at the time.

The allowance or refusal of a new trial in a homicide case is so clearly a matter within the discretion of the trial court that its action will not be reviewed in the absence of clear error.

A motion for a new trial in a homicide case, on the ground of after-discovered evidence, was properly refused where such evidence was largely cumulative and with due diligence might have been discovered before the trial.

The fact that the trial judge, in passing upon the motion for a new trial, considered the affidavit of a witness in ex-

CRIMINAL LAW—continued.

planation of his deposition, affords no ground for reversing the judgment.

After declarations have been admitted as dying declarations their weight and credibility are for the jury, and where such declarations are contradictory with each other it is the duty of the jury to weigh them and determine which, if any, are to be believed.

On the trial of an indictment for murder the evidence tended to show that defendant stepped from behind an abutment of a railroad bridge and fired two shots at deceased, that deceased ran a short distance and made statements charging defendant with the crime for which he was arrested half an hour thereafter near the scene of the shooting. There was evidence that defendant saw deceased shortly before the latter started toward his home, to reach which he would pass under the bridge, and there was further evidence that defendant was seen going toward the bridge shortly before the shooting. On the morning after the shooting a revolver containing three 38-calibre cartridges and two empty shells was found near the railroad tracks sixty rods from the bridge, and on the following day an empty cartridge case was found in the defendant's room with name and number corresponding to that on the cartridges found in the revolver. There was evidence that ill-feeling existed between defendant and deceased prior to the shooting. *Held*, there was sufficient evidence that the murder was committed by lying in wait, and a verdict of guilty of murder of the first degree will be sustained.

In such case the court did not err in charging that "the Commonwealth has shown that this cartridge box was found in the room of the defendant," the word "shown" used in such connection meaning "pointed out or made known by evidence," and not necessarily that the facts referred to had been established.

In a homicide case the fact that defendant on the afternoon of the day of the homicide withdrew from the local bank his entire deposit amounting to \$200, was a circumstance tending to show preparation for flight and was properly admitted.

Where the defense was an alibi attempted to be established by four persons in a store, who stated that defendant was in the store all evening (with the exception of a period of five minutes) until arrested, and it appeared that it would have taken from fifteen to twenty-five minutes to go to the scene of the shooting and return, but such witnesses were busy attending store and estimates made by some of them indicated

CRIMINAL LAW—*continued.*

that what seemed like four or five minutes was in reality twelve to twenty, the court properly charged that if the defendant was gone long enough from the store to have perpetrated the crime and returned, referring to such time as fifteen to twenty minutes, the jury might find him guilty, and further that "if you find from the weight of the testimony, from the preponderance of the evidence, that he (defendant) was not at the scene of the crime at the time of the killing, you must find a verdict of not guilty." *Com. v. Delano*, 272.

2. *Murder—First degree—Robbery—Motive—Ill will—Identification of defendant—Voice—Evidence—Res gestæ—Charge—Sufficiency—Avoiding arrest—Rebutting inference—Conviction of accomplices—Admissibility—Jurors of same name—Error in summoning—Waiver—Act of March 31, 1880, Sec. 53, P. L. 427.*

In the trial of an indictment for murder it appeared that the defendant and two confederates, all armed with revolvers and with their faces partly concealed with handkerchiefs, went to a shanty where deceased was visiting. The defendant entered, placed his revolver against deceased's head and shot and killed him instantly. Defendant and his confederates compelled the other occupants of the shanty to hold up their hands and took from the only one possessing any money all that he had. Defendant was positively identified by one of the occupants of the shanty by his size, unusually light hair, and by the features of the upper part of his face which was exposed, and was identified by another by his voice, although less positively. There was evidence that at about one o'clock on the day of the shooting defendant and his two confederates were together at a camp in the vicinity and were overheard talking about the money at the shanty and planning to get it, that later in the afternoon they were again overheard talking on the same subject, and that they left the camp together half an hour before the commission of the crime. Shortly after the shooting defendant appeared in the neighborhood acting in a nervous, excited and hurried manner and stated to two acquaintances, "we had some shooting up there and the neighbors are telephoning the police." There was evidence that three or four days before the murder deceased had said in the defendant's presence that defendant had taken money from him and had attempted to commit an unnatural offense upon him. Defendant fled and was apprehended seven months later in another state where he was working under an assumed name. *Held,*

CRIMINAL LAW—*continued.*

a verdict of guilty of murder of the first degree was justified by the evidence.

In a homicide case the statement by one of the witnesses to the shooting, just as the robbers were leaving the shanty, that the defendant was the one who had done it, was properly admitted as part of the *res gestæ*.

In such case the fact that deceased had accused defendant of criminal offenses was admissible as tending to show ill feeling between defendant and deceased, but not for the purpose of showing defendants guilt of an independent crime. In a homicide case it is proper for the Commonwealth to prove any facts naturally tending to show defendant's hostility toward deceased.

In such case, conceding that the defendant returned to the town where the crime was committed for a short time on the night of the homicide, and later gave his correct name in an adjoining county, the court could not charge as a matter of law that such facts rebutted any inference that the defendant fled for the purpose of avoiding arrest.

In such case in view of the evidence tending to establish a conspiracy between the defendants, and also of that tending to show that three men actually committed the robbery, evidence of the conviction and sentence of the other defendants was properly admitted.

The court is not required in a homicide case to call the jury's attention to every item of evidence, and it is no objection to a charge that something more might have been added. The charge is sufficient if it embraces the important features for and against the defendant.

In a homicide case it is not error for the court to charge "It would be a disgrace to the administration of the law if any considerable number of innocent men were ever convicted and it would be equally a disgrace if any large number of guilty men escaped."

Where a summons mailed to a juror in a borough was erroneously delivered to a person of the same name residing in an adjoining township and using the same post office, and the latter appeared and on his *voir dire* gave his correct name and residence, and was accepted and served as a juror, such irregularity was cured and affords no ground for setting aside a verdict in a homicide case. *Com. v. Denney*, 223.

3. Murder—Murder of the first degree—Charge—Evidence—Cross-examination.

A verdict of murder of the first degree was sustained where

CRIMINAL LAW—*continued.*

there was evidence to show that while the deceased and a third party were engaged in a fight the defendant heard the quarreling, came from a house some distance away, removed his coat, picked up a shovel, lifted the shovel with both hands and approaching the deceased from the back struck him a severe blow on the side of the head, from which blow deceased died.

In such case the court committed no error in refusing a point charging that there was no evidence to establish an intent to take life.

In such case the court committed no error in refusing to permit the attorney for the defendant to further cross-examine a witness produced by the Commonwealth in rebuttal to prove that the deceased had been seen at a specified time where such further cross-examination related to the location of other parties subsequent to the time testified to by the witness. *Com. v. Anthony*, 65.

4. *Murder—Voluntary manslaughter—Involuntary manslaughter—Charge—Conflicting instructions—Erroneous instructions—Pointing pistol to frighten—Evidence—Self-defense—Scope of direct examination of defendant—New trial.*

Where the plea to an indictment for murder is that defendant was acting in self-defense, it is reversible error to refuse to permit the defendant, while being examined as a witness in his own behalf, to be asked whether at the time he fired the shot he thought he was in peril of his life or of great bodily harm. The weight to be accorded such testimony is for the jury.

In such case the trial judge erred in refusing to correct such error on the ground that, in his judgment, there had been developed on the cross-examination of the defendant what would have been an affirmative answer to the disallowed question, where it appeared that in no one of defendant's answers to the questions put to him by the district attorney did he say that, when he shot deceased, he thought he was in peril of his life or of great bodily harm. His mere admission that he was in fear is not the equivalent of his unqualified declaration that he had acted in self-defense because he thought that he was in peril of his life or of great bodily harm.

Where correct and erroneous instructions are given in a charge it is not to be conjectured, especially in a capital case, which the jury followed.

On the trial of an indictment for murder where defendant testified that when he took the gun into his hands he was under the impression that it was unloaded and that his inten-

CRIMINAL LAW—*continued.*

tion was to use it to frighten the deceased away, the error committed in charging that if such were the honest belief and purpose of the defendant he would be guilty of voluntary manslaughter, the trial judge inadvertently using the word "voluntary" instead of "involuntary," is not cured by the fact that the court had in a previous part of the charge carefully distinguished between the two grades; and where in such case a conviction of voluntary manslaughter followed, a new trial was awarded. **Com. v. Wooley**, 249.

5. *Seduction—Statute of limitations—Misdemeanors—Flight—Return—Concealment within State—Act of March 31, 1860, P. L. 427-450, Sec. 77—"Usual resident"—Words and phrases—Tolling of statute—Promise to marry—Evidence—Sufficiency—Charge—Case for jury.*

1. One who is charged with a crime committed in a rural district and flees from arrest to another state but subsequently takes up his residence in a large city within the State and lives under his proper name, may be denied protection of the statute of limitations by disavowing his identity at times for the purpose of evading arrest.

The words "usual residence" within the meaning of the Act of March 31, 1860, P. L. 427-450, Section 77, requiring that all indictments for misdemeanors shall be brought within two years, provided "that if the person against whom the indictment shall be brought or exhibited, shall not have been an inhabitant of this State, or usual resident therein, during the said respective terms for which he shall be subject and liable to prosecution. . . . such indictment shall and may be brought against such person at any time within a similar space of time during which he shall be an inhabitant of or, usually resident within the State," do not refer only to defendant's place of residence but also to his manner of residence; "usual" when used in this sense means "customary" or "common"; to be a "usual resident" one must conduct himself in accordance with his customary mode of life.

One might commit an offense and move to another part of the State in an open manner, or even go from the State, if in military service, and not be barred from claiming the benefit of the statute of limitations, but this is not so where the offender flees from justice and subsequently by fraud and concealment, succeeds in avoiding arrest.

Where a person indicted in 1916 for the crime of seduction committed in 1910, pleaded the statute of limitation, it appeared that defendant left the State on learning that a warrant

CRIMINAL LAW—continued.

had been issued for his arrest; that no accurate account of his whereabouts thereafter appeared until 1913, when he took up his residence in Pittsburgh where he continued to reside until arrested; that since 1913 he worked at his trade as carpenter in different parts of that city, used his proper name there and received mail from the general delivery and at his various boarding houses, and paid taxes and voted in the district where he resided; that while a resident of Pittsburgh he frequently visited the rural district in which the crime was committed but on such occasions he denied his identity and used an assumed name, and that when arrested he denied his identity. *Held*, there was sufficient evidence to warrant a finding that defendant was not a "usual resident" of the State and that the statute of limitations should therefore be tolled, and the case was for the jury and a conviction in such case will be sustained.

If defendant had moved openly to Pittsburgh immediately after the commission of the crime for the bona fide purpose of taking up his residence there, he would have been a "usual resident" within the meaning of the statute.

Circumstantial evidence of an engagement of marriage is to be found in the proof of such facts as usually accompany that relation; among them may be mentioned letters, presents, social attentions of various kinds, visiting together in company, preparations for housekeeping, and the like.

In a prosecution for seduction, evidence that defendant had been paying constant attention to prosecutrix for practically one year, that they became engaged to be married about three months after they first met, at which time he gave her a ring; that defendant called on her at least once a week for several months, accompanied her in public, and one occasion repaired the engagement ring, sufficiently corroborated statement of prosecutrix that defendant promised to marry her. *Com. v. Weber*, 592.

CUSTOM.

1. *Fellow servant—Case for jury—Negligence—Master and servant—Mines and mining—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to warn of danger—Instruction—Delegation. Jelle v. Jamison O. & C. Co.*, 447.

DAMAGES.

1. *Compensatory and exemplary damages—Measure of damages—Pleadings—Statement of claim—Amendment—Departure—Present worth—Instructions—Failure to request more specific instructions—Negligence—Railroads—Ejectment of passenger at dangerous place. Leonard v. B. & O. R. R. Co., 51.*

2. *Measure of damages—Evidence—Character of treatment for injuries—Cross-examination of plaintiff—Negligence—Master and servant—Mines and mining. Clark v. Butler Junction Coal Co., 262.*

DAMS.

1. *Construction of dam—Dam partly in another county—Relief affecting entire dam—Overflowing of waters—Relief in personam—Equity jurisdiction—Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 13, 1836, P. L. 568; March 17, 1856, P. L. 388; April 6, 1869, P. L. 389; April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847—Equity Rule 10—Bill by riparian owner. Vandersloot v. Penna. W. & P. Co., 99.*

DEATH.

1. *Clothes catching fire—Lighting cigarette—Interval of leisure while awaiting material—Award—Act of June 3, 1915, P. L. 736—Workmen's Compensation Law—Injury in course of employment. Dziukowska v. Superior Steel Co., 578.*

2. *Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Absence of lights on engine—Engine visible—Harmless error—Directed verdict for defendant—Negligence—Railroads—Grade crossing—Pedestrian—Deafness—Degree of care. Krenn v. Pittsburgh, C., C. & St. L. Ry. Co., 443.*

DECEDENTS' ESTATES.

1. *Claim for domestic services—Nonsuit.*

In an action against the executor of a decedent's estate for domestic services rendered testatrix, judgment of nonsuit was properly entered where there was no proof of an express promise, and the testimony and presumption rebutted an implied promise to pay for the services rendered and where the presumption that the plaintiff was paid at stated intervals was not overcome. *Furrow v. Roland, 70.*

DECEDENTS' ESTATES—*continued.*

2. *Domicile of decedent—Jurisdiction, O. C.—Change of domicile—Evidence—Presumption against change—Probate of will.* **Barelay's Estate**, 401.

3. *Election to take against will—Exemption—Acts of April 1, 1909, P. L. 87, and July 21, 1913, P. L. 875—Appraisement—Exemption in cash.*

Where a husband elects to take his \$5,000 exemption under the Acts of April 1, 1909, P. L. 87, and July 21, 1913, P. L. 875, in cash, an appraisement is not necessary.

The husband of a testatrix elected to take against his wife's will and in the written election recited that the estate in question consisted of personal property, and particularly declared his desire to have \$5,000 allotted to him therefrom as allowed by the Act of April 1, 1909, P. L. 87. It appeared that the entire property for distribution consisted of cash or its equivalent. The auditing judge awarded decedent's husband the requested allowance, in addition to one-half of the remaining portion of her estate. Exceptions were filed to the \$5,000 award because there was no appraisement as provided by the Act of 1909. *Held*, the exceptions were properly dismissed. **Hollinger's Estate**, 72.

4. *Election to take against will—Share of husband—Lapsed legacies.*

Testatrix left no children and all the legacies provided for in her will save one had lapsed by reason of the deaths of the respective legatees prior to that of testatrix. The husband of testatrix elected to take against her will. He was awarded the \$5,000 exemption allowed by the act of assembly. The balance for distribution, consisting of personalty, was awarded one-half to appellant and the remainder after deducting the one unlapsed legacy to decedent's next of kin according to the intestate law. The husband filed exceptions contending that he was entitled to the entire personal estate represented by the lapsed legacies. The auditing judge dismissed the exceptions. *Held*, no error. **Hollinger's Estate**, 75.

5. *Executors and administrators—Wills—Joint will—Surcharge—Failure to file account—Commissions.*

Three unmarried and childless sisters made a will providing in part as follows: "We hereby order and direct that at the death of the one of us who shall first depart this life, all the property of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, real, personal or mixed, and whether owned by her individually or jointly or as tenant in common with the other two of us,

DECEDENTS' ESTATES—*continued.*

shall pass to and become vested absolutely in the survivors of us, and the two survivors shall pay all her just debts and funeral expenses. At the decease of the one who shall next depart this life, all her estate of every kind whatsoever of which she shall die seized, or to which she shall be entitled at the time of her decease, whether owned by her, individually, or jointly, or as tenant in common with the other survivor, and including what she shall acquire under this will as her share of the estate of the one of us who first died, shall pass to and become vested, absolutely, in the last survivor, and the last survivor shall pay all debts and funeral expenses then unpaid of the two who have previously died. We further order and direct that this will shall not be probated, unless necessary to determine the title of property herein disposed of, nor shall any appraisement, whatever, except for collateral inheritance tax, be made of any or either of our estates, until after the decease of the last survivor of the three of us, but that all our respective estates shall pass to and become vested in the survivors in kind as they shall be at the time of our respective deaths." After the death of the last surviving sister the executor under the will filed an account for her estate. Certain of the residuary legatees filed exceptions asking that the executor be surcharged for failure to convert assets and securities belonging to the estates of the two sisters who first died and to account for the same, that he be surcharged for failure to include certain notes belonging to the said estates, and that the executor's commissions be disallowed. The Orphans' Court refused to surcharge the executor and allowed the commissions. *Held*, no error. **Springer's Estate, 46.**

6. *Death of mortgagor—Scire facias against heirs—Failure to join administrator—Affidavits of defense—Insufficiency.*

While lands are assets for the payment of debts, they are not assets in the hands of an administrator and without an order of the Orphans' Court he has nothing to do with them. In case of intestacy they descend to the heirs, and if needed for the payment of debts they must be converted in the manner provided by the statutes.

In an action of scire facias sur mortgage, where it appeared that the mortgagor had died intestate, the heirs were properly made parties defendant and it was not necessary that the administrator of the decedent be joined, in the absence of anything to show that the decedent's real estate was needed for the payments of debts, and the court properly held insufficient an affidavit of defense which merely set up that the action

DECEDENTS' ESTATES—*continued.*

could not be maintained because the administrator has not been joined as party defendant.

In such case where the note was under seal there is no merit in the contention that the mortgagor was not a party to the note and it was therefore without consideration, where no failure or illegality of consideration is alleged.

The doctrine that interest as against the surety does not begin with the default by the principal, but from the time when demand was made, applies only to cases arising on official bonds. *Herron v. Stefenson*, 354.

DEEDS.

1. *Building restrictions—Building line—Covenants—Construction—Intention—Restricted space—Lowering grade—Erection of poles—Laying of street railway tracks—Bill in equity—Injunction.*

While building restrictions are enforceable, they are not favored by the law, and covenants relating to them are not to be extended by implication.

Words contained in a building restriction in a deed are to be interpreted in the light of the manifest object or purpose of the parties in using them. The meaning and extent of the building restrictions which were within the contemplation of the parties at the time it was imposed must prevail.

Where the deeds to a number of lots abutting on a street in a residential district provide that "no dwelling house or other building of any kind shall ever be erected or placed on said lot within twenty feet" of the street and that "a space of twenty feet shall always be open and clear of buildings or parts of buildings whatsoever" and the owners of a supplemental agreement duly recorded, increase the space to forty feet and covenant with each other "not to build or erect or suffer to be built or erected a building of any character whatever" in such space, a street railway company which has purchased two of the lots will be enjoined from lowering the grade of its lots within the restricted space and erecting poles and laying tracks thereon for a loop, on which street cars of large dimensions would pass or stand during any hour of the day or night. *Dewar v. Carson*, 599.

2. *Consideration—Parol evidence of different consideration—Witnesses—Competency—Testimony of surviving party—Act of May 23, 1887, P. L. 158, Sec. 5, Clause e—Contracts—Contracts for benefit of third person—Beneficiary's right to sue—Evidence. Edmundson's Estate*, 429.

DEEDS—continued.

3. *Real estate—Building restrictions—“Single dwelling house” on each lot—Erection of duplex building or apartment house—Bill in equity—Dismissal. Rohrer v. Trafford Real Estate Co., 297.*

4. *Recording of deeds—Priority—Acts of March 18, 1775, 1 Sm. L. 442, Sec. 1, and May 19, 1898, P. L. 108—Construction—Real property. Smith v. Young, 387.*

DEMURRERS.

1. *Affidavit of defense in nature of demurrer—Practice Act of May 14, 1915, P. L. 483—Contracts—Written contract—Subsequent parol agreement—Advancing time for completing work—Absence of provision as to increased compensation—Quantum meruit for increased cost—Practice, C. P.—Statement of claim—Insufficiency. Robert Grace Cent. Co. v. N. & W. Ry. Co., 241.*

DEVISES.

1. *Wills—Construction—Gift in fee—Defeasible gift—Intention. Nangle v. Irvin, 214.*

DISCRETION OF COURT.

1. *Rule to strike off judgment—Laches—Res adjudicata—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments. Bowman v. Berkey, 327.*

DISTRICT ATTORNEYS, see Public Officers.**DRY TRUSTS, see Trusts.****EJECTMENT.**

1. *Real property—Rule to bring ejectment—Party in possession—Jurisdictional facts—Evidence—Title—Will—Possession—Payment of rent—Act of June 10, 1898, P. L. 415.*

A proceeding under the Act of June 10, 1898, P. L. 415, by a party in possession of land to have an issue framed to determine title as against other claimants must comply with the provisions of the statute before a rule will be granted or an issue allowed. The jurisdictional facts required by the act must be averred in the petition, and relief will be granted if “it shall appear to the court that the facts set forth in the petition are true.”

EJECTMENT—continued.

Prior to the Act of 1893 conferring jurisdiction at law, a suitor was required to seek relief by a bill *quia timet* filed on the equity side of the court and thereby invoke the aid of a chancellor to remove a cloud resting upon his title to the land. A party may now avail himself of either the legal or equitable remedy.

In proceedings under the Act of June 10, 1893, P. L. 415, for the framing of an issue between the petitioner and the respondents to settle their respective rights in and to a two-acre lot of ground, where it appeared that petitioner occupied a house on a part of the premises and where there was nothing to show that there had been any division of the lot or that any other person was in adverse possession of the rest of the lot, the petitioner had such possession as to entitle her to invoke the aid of the act for the ascertainment of her rights.

In such case it was error to admit in evidence a will purporting to devise a part of the land to respondents, as the question for determination was not whether respondents had title to the premises, but whether petitioner had possession thereof, with disputed claim of title, and the fact that petitioner had offered some evidence of her title did not warrant respondents in offering evidence of their title.

The fact that the tenants occupying another house on the lot had paid rent to one of the respondents, was not admissible in evidence for the purpose of showing actual adverse possession in her, she must first establish that the rent was properly payable to her as owner of the part of the lots claimed by her, and this could only be done by showing that she had title to the premises, evidence of which was not admissible.
Bell's Petition, 495.

ELECTION LAW.

1. *Judges—Orphans' Court judges—Constitutional law—Constitution of Pennsylvania, Art. V, Sec. 25; Art. VIII, Sec. 2—Constitutional Amendments of 1909, P. L. 948—Time of election.*

An Orphans' Court judge is not a judge of a designated judicial district of a state, but of the court of the county in which he resides. If there be one of two, three or four counties, constituting a single judicial district, such judge is not a judge of that district with jurisdiction extending all over it, as in the case of each of the Common Pleas judges within it.

ELECTION LAW—continued.

His jurisdiction is limited to the county in which his court exists.

The intent of the sixth constitutional amendment of 1909, (P. L. 948), was to eliminate the spring election and to continue the constitutional provisions for the election of local or municipal officers on a day different from that on which general State officers are elected; judges of the several judicial districts are State officers but the duties which they perform are local and under the sixth amendment of 1909 they are in the class of officers to be elected at the municipal elections.

It is the intent of such amendment that Orphans' Court judges of the State are to be elected at the same time that elections are held for judges of the courts for the several judicial districts and for county, city, ward, borough and township officers for regular terms of service, and it is not material that they are not judges of the courts for the several judicial districts or that there are no other provisions in the Constitution, other than the sixth amendment of 1909 (P. L. 948), under which they can be elected.

Under Section 25 of Article V, and Section 8 of Article IV of the Constitution, where a vacancy happens by reason of death in a court of record within three months prior to the next election for judges, the vacancy is to be filled by appointment by the governor until the first Monday of January next succeeding the second election for judges after the occurrence of such vacancy, and this provision has not been made inoperative by the sixth amendment of 1909, amending Section 8 of Article IV, and providing that in the case of a vacancy in an elective office, the person appointed by the governor to fill it shall be succeeded by someone chosen on the next election day appropriate for such office, unless the vacancy shall happen within two calendar months immediately preceding such election, in which case the election for said office shall be held on the second succeeding election day appropriate for such office.

A judge of the Orphans' Court died within three months and more than two months prior to the next election for judges. Nomination petitions were prepared nominating certain persons as candidates for the vacancy caused by the death of such judge. In a suit in equity brought by a taxpayer to enjoin the county commissioners from printing the names of the nominees mentioned in such petition upon the ballots, the lower court dismissed the bill. *Held*, that the vacancy caused by the death of such judge could not be filled at the next

ELECTION LAW—continued.

election for judges, but must be filled by the governor, the incumbent holding office until the first Monday of January following the second election for judges held after the occurrence of such vacancy, and the decree was reversed with directions to grant the relief prayed for. **Buckley v. Holmes**, 176.

2. *Nominations—Candidates—Official ballot—Party nominations.*

Under the Act of April 29, 1903, P. L. 338, relating to elections, a person who has been nominated for public office by a political party at a primary election, may also be nominated by a political party subsequently formed, by means of nomination papers, and is entitled to have his name printed in the party column of each party which nominates him. **Town Meeting Party Nomination Papers**, 231.

EMBEZZLEMENT, see Criminal Law.

EMINENT DOMAIN.

1. *Parks—Appropriation of land—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus—Courts—Power over process—Boroughs.* **Vlekroy v. Ferndale Boro.**, 321.

2. *Water companies—Territorial rights—Special charter—Power to furnish within city limits—Incidental furnishing to suburban districts—Effect of Constitution of 1873—Acceptance of Act of April 20, 1874, P. L. 73—Ultra vires acts—Right of private parties—Remedy by Commonwealth—Act of June 19, 1871, P. L. 1360—Bill in equity—Injunction—Dismissal.* **Croyle v. Johnstown Water Co.**, 484.

EQUITY.

1. *Contract for sale of real estate—Specific performance—Laches—Failure to make tender—Refusal.*

Tender of performance on the part of the plaintiff is prerequisite to a decree for specific performance of a contract for the sale of real estate.

In a suit for specific performance, the plaintiff must show he has performed, or was ready to perform, his part of the contract, and that he has not been guilty of laches or unreasonable delay, and where the proof leaves the case doubtful the plaintiff is not entitled to a decree.

The granting of specific performance by a chancellor is a matter of grace, not of right.

EQUITY—continued.

In a proceeding in the Orphans' Court to compel specific performance of a contract for the sale of real estate owned by a decedent, where it appeared that the relief was not sought for more than three years after performance was due under the contract, that the petitioner was a corporation whose board had by resolution previously granted decedent and others leave to withdraw from the contract; that no tender of the consideration was made by the petitioner; that there was no resolution of the board authorizing the institution of the proceedings and many stockholders of the petitioner were opposed thereto, and where if the decree prayed for should be granted, a purchase-money mortgage would have to be given upon which foreclosure proceedings would in all probability have been necessary in the near future causing delay and inconvenience and expense, the court was not in error in refusing the relief prayed for. **Kutz's Estate**, 548.

2. *Corporations—Names—Confusion of names.*

A bill in equity to restrain a corporation from filing in the office of the secretary of the Commonwealth a certificate showing its change of name was properly dismissed where the evidence offered by the plaintiff did not sustain the conclusion averred in the bill, namely, that the change of name against which it protested would result in confusion in the business of the plaintiff and defendant. **Peoples Trust Co. v. Safe D. & T. Co.**, 62.

3. *Decree—Return of bonds—Accounting—Trusts and trustees—Guardian and ward—Embezzlement—Sale of bonds registered in ward's name—Failure of purchaser to make inquiry—Liability of purchaser to ward.* **Hamilton v. People's Trust Co.**, 220.

4. *Injunction—Judgment in prior suit—Res adjudicata—Estoppel—Church law—Church property—Dedication to certain purposes—Diversion.* **Kicinko v. Petruska**, 1.

EQUITY JURISDICTION.

1. *Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 3, 1836, P. L. 568; March 17, 1856, P. L. 388; April 6, 1859, P. L. 389; April 13, 1903, P. L. 139, and June 5, 1915, P. L. 847—Equity Rule 10—Construction of dam—Overflowing of waters—Dam partly in another county—Bill by riparian owner—Relief affecting entire dam—Relief in personam.*

It is against the policy of the jurisprudence of this State to bring nonresidents within the jurisdiction of our courts unless

EQUITY JURISDICTION—continued.

in very special cases, and the Act of April 6, 1859, P. L. 389, providing that any court having equity jurisdiction may upon due application authorize service outside the jurisdiction of the court in any suit "concerning.....lands, tenements and hereditaments.....situated or being within the jurisdiction of such court," is to be construed in harmony with such policy.

Service of a bill in equity outside of the jurisdiction of the court in which it is filed cannot properly be allowed under the authority of the Act of 1859, where the prayers for relief are not confined entirely to property alleged to be within the jurisdiction of the court, and where the relief, if granted, would require a decree against the defendant personally.

A bill in equity brought in York County against a Pennsylvania corporation to compel the removal of a dam which was partly in York County and partly in Lancaster County, and which was alleged to cause waters to overflow complainant's land in York County, was, by leave of the York County court, served on officers of the defendant in New York, where the company's principal office was located, and in Lancaster County, where its mills were situated. The prayers of the bill comprehended relief affecting the entire dam of the defendant, and also relief requiring a decree against the defendant personally. *Held*, the service was not within the authority of the Act of 1859, or other statutory authority, and a rule to set it aside should have been made absolute.

In such case there was no merit in the contention that the service was authorized under Equity Rule 10, which merely provides that "service of the bill and notice to appear and answer on a corporation shall be affected in the mode prescribed by law for the service of a writ of summons upon such corporation." The Acts of June 13, 1836, P. L. 568; March 17, 1856, P. L. 388; April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847, do not apply. *Vandersloot v. Penna. W. & P. Co.*, 99.

EQUITY PRACTICE.

1. *Adjudications—Exceptions—Chancellor and other judges—Opinion—Appeals.*

Where a court consists of more than one judge, exceptions to an adjudication must be heard by the other members of the tribunal in addition to the chancellor who tried the case, unless this course is made impossible by their physical disability or equally potent reasons, and the final disposition of the ex-

EQUITY PRACTICE—continued.

ceptions should be accompanied by a written opinion from the court in banc whenever the circumstances so require; and in the absence of such opinion the record will be returned by the appellate court for a written opinion by the court below.

Kieinke v. Petraska, 1.

2. *Bill in equity—Injunction—Bond—Affidavit—Receivers—Protection of property—Acts of March 21, 1806, 4 Sm. L. 326; June 16, 1836, P. L. 784, and May 6, 1844, P. L. 564, Section 1—Equity Rules 81 and 82—Jurisdiction of court.*

A court of equity is without jurisdiction to award an injunction where no bond has been filed as required by the Act of May 6, 1844, P. L. 564, Section 1, and made mandatory by the Act of March 21, 1806, 4 Sm. L. 326.

Equity rules, promulgated by the Supreme Court in pursuance of the Act of June 16, 1836, P. L. 784, have the force of statutory enactments and must be strictly complied with.

The Act of 1844 and Equity Rules 81 and 82 requiring a bond and injunction affidavits apply where a receiver invokes the aid of equity to protect property in his possession from interference or invasion. The act is mandatory and applies to all cases.

A light company was declared insolvent and a receiver appointed by the Court of Common Pleas. Thereafter creditors filed a petition in bankruptcy, receivers in bankruptcy were appointed and the property turned over to them. Subsequently the petition in bankruptcy was dismissed and the receivers in bankruptcy filed their account, but were not discharged. The receiver previously appointed by the Common Pleas Court took possession of the property and filed a bill in equity for an injunction to restrain the receivers in bankruptcy from interfering with his management of the property; but failed to file a bond or injunction affidavits. The lower court granted a preliminary injunction which it subsequently refused to dissolve. *Held*, that the court was without jurisdiction to enter such decree and the injunction was dissolved. **Baur v. Wilkes-Barre Light Co., 117.**

ESTATES TAIL.

1. *Wills and devises—Real estate—Act of April 27, 1855, P. L. 368—Construction—Intention.* **Cross v. Dye, 207.**

ESTOPPEL.

1. *Church law—Church property—Dedication to certain purposes—Diversion—Equity—Injunction—Judgment in prior suit—Res adjudicata.* **Kieinke v. Petraska, 1.**

ESTOPPEL—continued.

2. *Contracts—Municipal contracts—Township of second class—Water supply—Acts ultra vires—Act of May 25, 1907, P. L. 231. Trevorton Water Supply Co. v. Zerbe Twp., 31.*

3. *Judgment for defendant n. o. v.—Fire insurance—Application—Answers to questions—Misrepresentations—Flour mill—Character of power used—Inspection—Breach of warranty. Corbin v. Millers Mut. Fire Ins. Co., 106.*

EVIDENCE.

1. *Admissibility—Negligence—Railroads—Locomotive whistle—Deafening fireman on locomotive on next track—Interstate commerce—Federal Employer's Liability Act—Fellow servant rule—Failure to warn of blowing of whistle—Common knowledge—Custom to warn. Royer v. Penna. R. R. Co., 488.*

2. *Admission of evidence—Inadequate objection—Supreme Court practice. Brown v. Kittanning Clay Products Co., 267.*

3. *Burden of proof—Presumption—Opening judgment—Discretion of court—Rule to strike off judgment—Laches—Res adjudicata—Judgments—Judgment notes—Alleged alteration—Addition of seal. Bowman v. Berkey, 327.*

4. *Sufficiency—Charge—Case for jury—Criminal law—Statute of limitations—Misdemeanors—Flight—Return—Concealment within State—Seduction—Promise to marry. Com. v. Weber, 592.*

5. *Contracts—Suretyship—Coal lands—Receipts—Explanation—Legal effect of receipt—Excessive verdict—Motion for new trial—Charge of court—Failure to request. Pittsburgh Block Coal Co. v. Oliver Coal Co., 290.*

6. *Criminal law—Murder—First degree—Robbery—Motive—Ill will—Identification of defendant—Voice—Res gestæ—Charge—Sufficiency—Avoiding arrest—Rebutting inference—Conviction of accomplices—Admissibility—Jurors of same name—Error in summoning—Waiver—Act of March 31, 1860, Sec. 53, P. L. 427. Com. v. Denny, 223.*

7. *Deeds—Consideration—Parol evidence of different consideration—Witnesses—Competency—Testimony of surviving party—Act of May 23, 1887, P. L. 158, Sec. 5, Clause e—Contracts—Contracts for benefit of third person—Beneficiary's right to sue. Edmundson's Estate, 429.*

8. *Discharge of surety—Principal and surety—Assignment of debt—Transfer of collateral security—Default—Sale of collateral—Application of proceeds to unsecured debt—Value of stock. Beaver Trust Co. v. Morgan, 567.*

EVIDENCE—continued.

9. Entry in bank's books—Attorney and client—Privileged communication—Banks and banking—Bank deposits—Transactions outside of usual banking hours—Liability of bank. **Gonder v. Farmers Nat. Bank**, 197.

10. Evidence of witness's previous statement—After-discovered evidence—Cumulative evidence—Murder—First degree—Lying in wait—Adverse witness—Cross-examination—Threats—Ill feeling—Remoteness—Admissibility—Motive—Scope of cross-examination of defendant—Improper remarks of district attorney—Failure to object—Dying declaration—Conflicting declarations—Defenses—Alibi—New trial. **Com. v. Delano**, 272.

11. Hearsay—Evidence of declaration of agent. **Brown v. Kittanning Clay Products Co.**, 267.

12. Judgments—Presumption of payment. **Camp v. John**, 38.

13. Leading question—Negligence—Railroad crossings—"Stop, look and listen"—Presumption—Contributory negligence—Burden of proof—Nonsuit. **Waltosh v. Penna. R. R. Co.**, 372.

14. Mortgages—Foreclosure—Production of bond. **Andersea v. Horn**, 81.

15. Murder—Murder of the first degree—Charge—Criminal law—Cross-examination. **Com. v. Anthony**, 65.

16. Partnerships—Existence of insufficiency—Going business—Trustees—Tenants in common—Sharing of profits—Assignment for creditors—Accounting—Commissions. **First Nat. Bank v. Gitt and Delone**, 84.

17. Preponderance of evidence with defendant—Conflicting evidence—Case for jury—Master and servant—Bricklayer—Fall of brick arch on workman—Assumption of risk—Contributory negligence. **Van v. Richmond**, 300.

18. Presumption against change—Probate of will—Jurisdiction, O. C.—Decedents' estates—Domicile of decedent—Change of domicile. **Barclay's Estate**, 401.

19. Rebuttal—Absence of lights on engine—Engine visible—Harmless error—Directed verdict for defendant—Negligence—Railroads—Grade crossing—Pedestrian—Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence. **Kreman v. Pittsburgh, C., O. & St. L. Ry. Co.**, 443.

20. *Res gestæ*—Conversation—Rulings by trial judge—Questions considered on appeal—Negligence—Railroads. **Leonard v. B. & O. R. R. Co.**, 51.

EVIDENCE—continued.

21. *Self-defense—Scope of direct examination of defendant—New trial—Criminal law—Murder—Voluntary manslaughter—Involuntary manslaughter—Charge—Conflicting instructions—Erroneous instructions—Pointing pistol to frighten. Com. v. Wooley, 249.*

22. *Jurisdictional facts—Title—Will—Possession—Payment of rent—Act of June 10, 1893, P. L. 415—Real property—Rule to bring ejectment—Party in possession. Bell's Petition, 495.*

23. *To toll statute of limitations—Insufficiency—Indebtedness on several obligations—Payment—Application to barred claim without debtor's consent—Subsequent promise to pay. Montgomery's Estate, 412.*

24. *Unauthorized circular by officer—Beneficial associations—Failure to include by-laws in certificate—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7. LaFerty v. Supreme Council Cath. Mut. Ben. Assn., 452.*

25. *Written instruments—Parol evidence—Fraud, accident and mistake—Landlord and tenant—Leases—Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Pleadings—Act of May 14, 1915, P. L. 483, Sec. 2—Practice, C. P.—Judgment on warrant—Framing issue. Williams v. Notopoulos, 469.*

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1. *Equity practice—Adjudications—Chancellor and other judges—Opinion—Appeals. Kleinke v. Petraska, 1.*

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1. *Wills—Joint will—Surcharge—Failure to file account—Commissions. Springer's Estate, 46.*

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1. *Practice, Supreme Court—Appeals—Auditing judge—Conclusiveness. Edmundson's Estate, 429.*

FIRE INSURANCE, see Insurance.

FOREIGN CORPORATIONS, see Corporations.

GAS AND ELECTRIC COMPANIES.

1. *Wires—Defective transformers—Death of lineman—Presumption of care—Contributory negligence—Negligence—Master and servant—Notice—Conflicting facts—Case for jury. Faulk v. Duquesne Light Co., 389.*

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GUARDIAN AND WARD.

1. *Embezzlement—Sale of bonds registered in ward's name—Failure of purchaser to make inquiry—Liability of purchaser to ward.*

Where a guardian sold to a bank certain corporate bonds registered in the name of his ward, such bonds providing that after registration no transfer thereof would be valid unless made on the books of the company, it was the duty of the officer of the bank with whom the guardian dealt to make inquiry as to the authority of the guardian to make the sale, although such officer did not know that he was dealing with a guardian, and where no such inquiry was made the bank was not in the position of a purchaser without notice, and a decree in equity to compel a surrender of such bonds to the ward and for an accounting, was proper. **Hamilton v. People's Nat. Bank**, 220.

INJUNCTIONS.

1. *Boroughs—Street railways—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches—"Switches"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough—Laches—Bill in equity. Pittsburgh Rys. Co. v. Carrick Boro.*, 333.

2. *Corporations—Directors—Fight for control—Issuance of stock—Purchase by directors present at meeting—Right of stockholders to participate in issue—Setting aside of issue—Trust—Fraud—Remedy at law—Equity—Jurisdiction—Bill in equity by stockholder. Glenn v. Kittanning Brew. Co.*, 510.

3. *Deeds—Building restrictions—Building line—Covenants—Construction—Intention—Restricted space—Lowering grade—Erection of poles—Laying of street railway tracks—Bill in equity. Dewar v. Carson*, 599.

4. *Dismissal—Constitutional law—Const. of Penna., Art. III, Secs. 7 and 11, Art. IX, Sec. 7, and Art. I, Sec. 1—Declaration of rights—Local and special laws—Gratuities—Contractors—Encroachment on judicial prerogatives—Counties—Contracts—Work done under constitutional act—Curative act—Constitutionality—Acts of May 11, 1909, P. L. 506, and April 20, 1917, P. L. 91. Kennedy v. Meyer*, 306.

5. *Dismissal—Water companies—Eminent domain—Territorial rights—Special charter—Power to furnish within city limits—Incidental furnishing to suburban districts—Effect of Constitution of 1873—Acceptance of Act of April 29, 1874, P. L. 73—Ultra vires acts—Right of private parties—Remedy by*

INJUNCTIONS—*continued.*

Commonwealth—Act of June 19, 1871, P. L. 1380—Bill in equity. **Croyle v. Johnstown Water Co.**, 484.

6. *Equity practice*—Bond—Affidavit—Receivers—Protection of property—Acts of March 21, 1806, 4 Sm. L. 326; May 6, 1844, P. L. 564, Sec. 1, and June 16, 1836, P. L. 784—Equity Rules 81 and 82—Bill in equity. **Baur v. Wilkes-Barre Light Co.**, 115.

7. *Judgment in prior suit*—*Res adjudicata*—*Estoppel*—Church law—Church property—Dedication to certain purposes—Diversion—Equity. **Kicinko v. Petraska**, 1.

INSURANCE.

1. *Beneficial associations distinguished from insurance companies*—By-laws of society—Death benefits—Failure to include by-laws in certificate—Evidence—Unauthorized circular by officer—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7—Case for jury. **Lafferty v. Supreme Council Cath. Mut. Ben. Assn.**, 452.

2. *Fire insurance*—Application—Answers to questions—Misrepresentations—Flour mill—Character of power used—Inspection—Breach of warranty—Estoppel—Judgment for defendant *n. o. v.*

In an action on a fire insurance policy covering a flour mill operated by water power with a gasoline engine as auxiliary power a verdict should have been directed for the defendant where it appeared that to specific questions in the application plaintiff answered that only water power was used; that while defendant's secretary actually inspected the premises and saw the gasoline engine the application was not received by him until several months thereafter, and that before the policy was issued he communicated with the plaintiff stating that an additional rate was chargeable if gasoline power was also employed, and that with full knowledge of the difference in the rates plaintiff remitted the premium chargeable if water power only was used.

In such case the company was justified in inferring from applicant's written declaration and from the payment of the lower premium that only water power was used, that plaintiff intended to represent that the use of the gasoline engine in operation at the time of the inspection by defendant's secretary had been abandoned, and defendant was not estopped by reason of such inspection from setting up the breach of warranty of the truth of plaintiff's answers to the questions in the application. **Corbin v. Millers Mut. Fire Ins. Co.**, 106.

INTERSTATE COMMERCE.

1. *Negligence—Railroads—Locomotive whistle—Deafening of fireman on locomotive on next track—Federal Employer's Liability Act—Fellow servant rule—Failure to warn of blowing of whistle—Common knowledge—Evidence—Custom to warn—Admissibility.* **Royer v. Penna. R. R. Co.**, 438.

JUDGMENT N. O. V.

1. *Judgment for defendant n. o. v.—Fire insurance—Application—Answers to questions—Misrepresentations—Flour mill—Character of power used—Inspection—Breach of warranty—Estoppel.* **Corbin v. Millers Mt. Fire Ins. Co.**, 106.

2. *Judgment for defendant n. o. v.—Negligence—Master and servant—Calling another to assist servant—Injuries to person called.* **Byrne v. Pittsburgh Brewing Co.**, 357.

3. *Judgment for defendant n. o. v.—Negligence—Municipalities—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing of wire in mud with broom—Splashing of mud—Injury to eye—Proximate cause—Court and jury.* **Braggeman v. York**, 94.

JUDGMENTS.

1. *Judgment in prior suit—Res adjudicata—Estoppel—Church law—Church property—Dedication to certain purposes—Diversion—Equity—Injunction.* **Kleinke v. Petruska**, 1.

2. *Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments—Discretion of court—Rule to strike off judgment—Laches—Res adjudicata.*

Although the addition of a seal after the signature of the maker of a note is such a material alteration as will avoid the instrument, an alteration by a third person, without the knowledge or consent of the party to the writing, cannot in any way affect the holder's right or impair the validity of the instrument in its original form.

In proceedings to open a judgment, entered upon a judgment note, evidence showing alterations subsequent to the execution of the instrument, upon which the judgment is based, is ample to meet the burden imposed upon the defendant by law to make a good defense by evidence sufficient to justify submission to the jury and to sustain a verdict for defendant if believed by the jury.

The uncontradicted testimony of plaintiff and her witnesses to the effect that the addition of the seal was not made by her or by any one for her, at her request, does not shift to de-

JUDGMENTS—*continued.*

fendant the burden of showing who was responsible for its presence on the note.

When an erasure, alteration or interlineation appears on the face of an instrument, there is primarily a presumption that the change was made before execution. If the alteration does not appear to be beneficial to the party offering the writing or if it is opposed to his interest, or if made with the same pen and ink and in the same handwriting as the body of the writing, this presumption remains unchanged. Where, however, the alteration is material, is beneficial to the party offering the writing, or if there be a change on the face of the instrument which appears suspicious, the presumption disappears and the burden is on the party offering the writing to explain the alteration to the satisfaction of the jury.

In proceedings to open a judgment entered upon a judgment note, on the ground that, after the execution of the note, a seal had been added thereto, where the plaintiff neither admits nor directly denies the subsequent alteration but states that no alteration was made by her or for her with her authority, such testimony is wholly insufficient to enable the court to say as a matter of law that she has met the burden and satisfactorily accounted for the altered condition of the writing, and, as in such case the real dispute is not so much as to the fact of adding the seal as by whom added, such question is one of fact for the jury, and the court did not err in opening the judgment.

In such case the fact that a motion to strike the judgment from the record had been dismissed, was not *res adjudicata* of the question involved as the mere fact that the seal was in a different handwriting from that of the maker of the note, was not such an irregularity as would warrant the striking off of the judgment.

In such case the defendant was not guilty of laches in taking the rule to open the judgment where it appeared that the judgment was entered on November 5, 1914, that a rule to strike off the judgment was taken on November 28th following, and was discharged on September 1, 1916, and on September 14, 1916, a petition to open the judgment was filed. **Bowman v. Berkey**, 327.

3. *Presumption of payment—Evidence.*

After the expiration of twenty years from maturity, judgments, mortgages and all like obligations are presumed paid and it requires satisfactory and convincing evidence to overcome that presumption.

JUDGMENTS—*continued.*

On a sci. fa. brought by a use-plaintiff on a judgment entered on an indemnity bond given by a collector of taxes where it appeared that the judgment had been entered more than twenty years prior to the issuance of the writ where there was no satisfactory evidence to overcome the presumption of payment by lapse of time, a judgment was properly directed for the defendant. **Camp v. John**, 38.

JURISDICTION, C. P.

1. *Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness—Boroughs—Contracts—Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Practice, C. P.—Act of July 26, 1913, P. L. 1374—Trial by jury.*

Since the Act of July 26, 1913, P. L. 1374, matters within the jurisdiction of the Public Service Commission, including the reasonableness of rates charged by public service corporations, must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy.

The decision of the Public Service Commission on the subject of rates is subject to review, and the courts are vested with the right and fixed with the duty of passing upon the record brought up on appeal, which record shall include the testimony, the findings of facts, if any, of the commission based upon such testimony, a copy of all orders made by the Commission in said proceedings, and a copy of the opinion, if any, filed by the commission.

In cases where the parties had a right to trial by jury before the Act of 1913, such right is still preserved to them.

It is the duty of the reviewing court, if it shall find from the record that an order of the Public Service Commission appealed from is unreasonable, or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, to enter a final decree reversing the order of the Commission, or, in its discretion, to remand the record to the commission with directions to reconsider.

The fact that no complaint is made to the Public Service Commission when an application for a change of rate is filed with that body, does not prevent any person affected thereby from subsequently entering a complaint.

Where a contract fixing a rate unlimited in time has been entered into by a public service company with a borough prior to the Act of 1913, the State has the right, under authority of

JURISDICTION, C. P.—*continued.*

that act, through the Public Service Commission, notwithstanding the contract, to inquire into and adjust the rate to a reasonable basis.

A bill in equity brought by a borough against a street railway company to restrain defendant either from running its cars over a certain route or from charging more than a certain fare, on the ground that the proposed increase of fare was unreasonable and that a contract existed with the borough under which the defendant was prohibited from charging a higher rate, was properly dismissed for want of jurisdiction where it appeared that the matter had not been submitted to the Public Service Commission.

In such case the borough should file its complaint with the Public Service Commission, and if the commission permits the increase, the borough can, on appeal, raise all questions properly involved in which it has an interest and have them passed upon by the courts. *St. Clair Boro. v. T. & P. Elec. Ry. Co.*, 462.

2. *Quo warranto*—Justices of the peace—County officers—District attorney. *Com. v. Cameron*, 209.

JURISDICTION, EQUITY.

1. *Bill in equity by stockholder*—Injunction—Corporations—Directors—Fight for control—Issuance of stock—Purchase by directors present at meeting—Right of stockholders to participate in issue—Setting aside of issue—Trust—Fraud—Remedy at law. *Glenn v. Kittanning Brew. Co.*, 510.

JURISDICTION, J. P.

1. *Residence of justice*—Act of February 22, 1802, § Smith's Laws, 490. *Com. v. Cameron*, 209.

JURISDICTION, O. C.

1. *Decedents' estates*—Domicile of decedent—Change of domicile—Evidence—Presumption against change—Probate of will.

A domicile once acquired is presumed to continue until it is shown to have been changed, and where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable, first, residence in the new locality, and second, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change; until the new one is acquired the old one remains.

JURISDICTION, O. C.—*continued*.

On an appeal from the probate of a will on the ground that deceased was not a resident of the State at the time of her death, it appeared that deceased died in Canton, Ohio, on November 18, 1915, leaving the testamentary paper in question dated December 18, 1915, with the addenda in her handwriting, "July 1, 1915, Pittsburgh, Pa., 1615 Buena Vista St., N. S." The will named a resident of Pittsburgh as the executor. It further appeared that deceased was born in Ohio, came to Pittsburgh in 1871, and lived there with her husband from that time until his death in 1878; that her husband's will was probated and his estate administered in Allegheny County; that decedent went to Paris in 1880 and lived there until 1904, when she went to New York City and lived until February, 1913; that she then furnished two rooms in a house owned by her in Canton, Ohio, and occupied by her cousin, and boarded with him until her death; that when she purchased the house in question in Canton it was her intention to have the deed made to her cousin but she was advised by counsel that she could as well give it to him by her will; that she was a member of a church in Pittsburgh; that her husband and one child and herself were buried in a cemetery near Pittsburgh; that in previous wills prepared for her in 1908 and 1911 the introductory clauses referred to Pittsburgh as her residence; that her bank account and investments were in Pittsburgh; and that while living in New York, Paris and Canton she had declared to a number of witnesses that she regarded Pittsburgh as her home and her stay in Canton as an experiment, and temporary; and that she made frequent visits to Pittsburgh while living at the other places named; while the only facts offered to show a change of residence were the purchase of the house in Canton and her living there in furnished rooms until her death, that she had registered on several occasions at the Y. W. C. A. building as residing in Canton, and her name appeared in the Canton directory as a resident. *Held*, the court did not err in finding that decedent was a resident of Pittsburgh at the time of her death, and the will was properly admitted to probate. *Barclay's Estate*, 401.

JURY AND JURORS.

1. *Jurors of same name—Error in summoning—Waiver—Act of March 31, 1880, Sec. 58, P. L. 427—Criminal law—Murder—First degree—Robbery—Motive—Ill will—Identification of defendant—Voice—Evidence—Res geste—Charge—Sufficiency—Avoiding arrest—Rebutting inference—Conviction of accomplices—Admissibility. Com. v. Denzery*, 223.

JUSTICES OF THE PEACE, *see* Public Officers.

LACHES.

1. *Bill in equity—Injunction—Boroughs—Street railways—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches—"Switches"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough. Pittsburgh Rys. Co. v. Carrick Boro., 333.*

2. *Equity—Contract for sale of real estate—Specific performance—Failure to make tender—Refusal. Kutz's Estate, 548.*

3. *Res adjudicata—Judgments—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments—Discretion of court—Rule to strike off judgment. Bowman v. Berkey, 327.*

LANDLORD AND TENANT.

1. *Leases—Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Pleadings—Act of May 14, 1915, P. L. 483, Sec. 2—Practice, C. P.—Judgment on warrant—Framing issue—Evidence—Written instruments—Parol evidence—Fraud, accident and mistake.*

Under the Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1, which is in force in Pennsylvania, all the rights and remedies under a lease, which belonged to the lessor, belong to the lessor's grantee.

A condition, on breach of which a tenant's interest may be terminated, is to be distinguished from a covenant the breach of which cannot in the absence of a statutory provision to the contrary affect the tenant's interest but merely gives the landlord a right of action for damages, or, occasionally, a right to an injunction, or a decree for specific performance. Mere words of agreement, not contemplating a termination of the lessee's interest upon his default, create a covenant, and not a condition.

Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such, will make it a condition upon which the continuance of an estate granted depends. Where the language of an agreement can be resolved into a covenant the judicial inclination is so to construe it.

LANDLORD AND TENANT—*continued*.

To justify a refusal to accept on the ground that work or material must be satisfactory to the party acquiring it, the objection must be made in good faith and must not be merely capricious.

Under the rule that an uncertainty as to the meaning of a clause in a lease is to be determined in favor of the lessee, the court will not construe a provision in a lease for confession of judgment in ejectment on the breach of any of the "conditions" of the lease to include covenants and agreements, although covenants, agreements and conditions are placed substantially on the same basis, and a breach of either gives the lessors the right to declare a forfeiture.

A lease provided "lessee. . . . agrees that all plans for alterations, improvements and changes in said buildings shall be submitted to and be approved in writing by the said lessors, their duly authorized agents or attorneys, before any work is done or changes made in said buildings," and further provided "on the breach of any of the conditions of this lease" the lessor may obtain possession by means of an amicable action and confession of judgment in ejectment. Thereafter the lessor assigned the reversion and the lessee made improvements without the consent of the owner. There was evidence that the lessor's refusal was capricious and not made in good faith and solely for the purpose of enabling him to gain possession of the demised premises by forfeiture of the unexpired term of the lease. *Held*, (1) under the terms of the lease plaintiff is not entitled to an amicable action and confession of judgment in ejectment by reason of the alleged breach of the agreement that his plans should be submitted to and approved by the lessors, before he began work on the alterations; (2) the questions of plaintiff's good faith in his refusal to approve the plans which defendant submitted to him is one of fact which should have been submitted to the jury, and (3) the trial judge erred in directing a verdict for plaintiff.

In such case evidence as to a conversation between the lessor and lessee in reference to an insertion in the lease of the clause as to alterations and of an alleged promise made by the lessor in regard to the alterations that would be permitted under such clause, was properly excluded where such conversation took place five days prior to the execution of the lease and there was no allegation that anything had been omitted from the lease by fraud, accident or mistake. Such evidence could not have been admissible even though the conversation had been contemporaneous with the execution of the lease.

LANDLORD AND TENANT—continued.

In such case where the record consisted of a statement of claim, an answer by defendant in the form of a petition to open the judgment and a reply thereto by plaintiff, the pleadings sufficiently complied with the Practice Act of 1915, requiring that in actions of assumpsit "the pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense, and where a set-off or counterclaim is pleaded, the plaintiff's reply thereto," and plaintiff cannot complain in such case that the court erred in proceeding to trial without a formal issue having been framed. The better practice is to formally state the issue and to incorporate the questions to be decided by the jury into the order so that they can be answered specifically. **Williams v. Notopoulos**, 469.

LEASES.

1. *Coal leases—Accounting—Construction—Forfeiture—Mines and mining.* **Drake v. Berry**, 8.
2. *Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Pleadings—Act of May 14, 1915, P. L. 483, Sec. 2—Practice, C. P.—Judgment on warrant—Framing issue—Evidence—Written instruments—Parol evidence—Fraud, accident and mistake—Landlord and tenant.* **Williams v. Notopoulos**, 469.

LIFE ESTATE.

1. *Remainders—"Lawful heirs"—Ejectment—Act of April 27, 1855, P. L. 368—Wills—Construction—Definite failure of issue.* **McClintic v. McClintic**, 112.
2. *Revocation of bequest for life—Effect on interest in remainder—Wills—Construction—Remainders.* **May's Estate**, 115.

LOCAL AND SPECIAL LEGISLATION, see Constitutional Law.**MANDAMUS.**

1. *Courts—Power over process—Boroughs—Eminent domain—Parks—Appropriation of land—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay.* **Vickroy v. Ferndale Boro.**, 321.

MASTER AND SERVANT.

1. *Brewing company—Moving machinery—Change in operation—Increased danger—Failure to notify employee—Contributory negligence—Instructions to jury—Failure to request—Negligence—Earning power—Charge of court—Pleading—Variance. Yeager v. Anthracite Brewing Co., 123.*

2. *Bricklayer—Fall of brick arch on workman—Assumption of risk—Contributory negligence—Conflicting evidence—Preponderance of evidence with defendant—Case for jury.*

The credibility of oral testimony is for the jury.

Where the testimony offered by the plaintiff makes out a *prima facie* case by showing the existence of facts from which an inference of negligence arises, the case is necessarily for the jury, notwithstanding that the great preponderance of the testimony is with the defendant. An inference of negligence having once arisen remains until overcome by countervailing proof, and whether it is so overcome is a question for the jury.

In an action against building contractors to recover for injuries sustained by the falling of a brick arch on a workman, where it appeared that during the construction of the building plaintiff was assigned by the defendants to build such arch on a supporting wooden form erected by defendant's carpenters, that after the completion of the arch it fell on the plaintiff causing the injuries complained of, and the evidence was conflicting as to how the fall of the arch was occasioned, plaintiff's version being that the form had been removed at the direction of defendant's foreman, that plaintiff had complained to him of its removal but that the foreman had assured him that it was safe, that relying upon the foreman's forty years' experience plaintiff continued at his work and three quarters of an hour later the arch fell, while defendants' version was that the form had not been removed but that the arch fell by reason of plaintiff's placing his body or leg over it, causing it to buckle, and that plaintiff had admitted thereafter that the occurrence was his own fault, the court did not err in refusing to charge that as a matter of law plaintiff had assumed the risk.

In such case the court did not err in refusing to charge that the duty rested on the plaintiff to establish by the weight of evidence that there was no act or omission on his part, as an experienced bricklayer, amounting to want of ordinary care, which concurred with the alleged negligence of the defendants in causing the injury. *Van v. Richmond, 300.*

3. *Cab company—Hire of team and driver—Driver assisting in hirer's work—Special and general employment—Negligence*

MASTER AND SERVANT—continued.

of driver—Injury to hirer's employee—Action against cab company—Respondeat superior—"Carriage cases" distinguished—Negligence. Puhlman v. Excelsior Express and Standard Cab Co., 393.

4. Death of workman—Parties defendant—Corporations—Identity of master—Evidence—Hearsay—Declaration of agent—Charge of court—Negligence. Brown v. Kittanning Clay Products Co., 267.

5. Defective scaffold—Fall of workman—Safe place to work—Employer's duty to inspect and repair—Delegation of duty—Foreman—Vice-principal—Obvious danger—Assumption of risk—Contributory negligence—Case for jury—Negligence. Swartz v. Bergendahl-Knight Co., 421.

6. Negligence—Calling another to assist servant—Injuries to the person called—Judgment for defendant n. o. v. Byrne v. Pittsburgh Brewing Co., 357.

7. Negligence—Electric company—Wires—Defective transformers—Notice—Death of lineman—Presumption of care—Contributory negligence—Conflicting facts—Case for jury. Faulk v. Duquesne Light Co., 389.

8. Negligence—Mines and mining—Bituminous Coal Mine Act of June 9, 1911, P. L. 756—Construction of passageway—Mine foreman—Negligence of mine foreman—Constructive notice of defect—Contributory negligence—Nonsuit. Cossette v. Paulsen Coal Min. Co., 520.

9. Negligence—Mines and mining—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to warn of danger—Instruction—Delegation—Custom—Fellow servant—Case for jury. Jellie v. Jamison C. & C. Co., 447.

10. Negligence—Mines and mining—Damages—Measure of damages—Evidence—Character of treatment for injuries—Cross-examination of plaintiff. Clark v. Butler Junction Coal Co., 262.

11. Negligence—Railroad company—Safe place in which to work—Assumption of risk—Case for jury. Lamb v. Penna. R. R. Co., 536.

12. Negligence—Safe place to work—Fall—Subcontractors—Injuries to workman—Liability. Moran v. Gen. Fire Extinguisher Co., 168.

13. Safe place to work—Minors under sixteen—Employment—Factory Act of April 29, 1909, P. L. 283—Violation—Duplicate lists—Posting of lists—Negligence—Proximate cause—Burden of proof—Exception. Chabot v. Pittsburgh Plate Glass Co., 504.

MINERALS.

1. *Real estate—Owner of land only—Partition. Young's Estate, 208.*

MINES AND MINING.

1. *Coal leases—Accounting—Construction—Forfeiture.*

"Miners' weight" as used in a coal lease is not a fixed, unvarying quantity of mine run material, but is such quantity of the same as operators and miners may from time to time agree as being necessary or sufficient to produce a ton of prepared coal.

Where a coal lease provided "miners' weight to be the standard" of each ton of coal mined, and thereafter the successors in title of the lessors brought a bill in equity against the lessees for an accounting for coal mined, the court properly decided that the accounting should be on the basis of the miners' weight fixed upon by the operators and miners during the accounting period, not upon the basis of the miners' weight as it existed at the time of the execution of the lease.

Drake et al. v. Lacoe et al., 157 Pa. 17, followed.

In such case, a provision in the lease "that sufficient pillars of coal shall be left to support the roof over the gangways and the usual protection of the mines generally," was for the protection of the colliery, not of the surface, and the successors of the lessors, though owning the surface, were not entitled to an injunction to restrain the removal of coal from the pillars, especially after all reason to apprehend surface disturbance by the removal of such coal had ceased to exist.

In such case a usage that the owner of the surface was entitled to one-third of all the pillar coal, could not be set up to defeat a grant of all the coal in the mine, and the successor of the lessor was not entitled to restrain the removal of such coal or to have a forfeiture of the lease declared because of such removal. *Drake v. Berry*, 8.

2. *Negligence—Master and servant—Bituminous Coal Mine Act of June 9, 1911, P. L. 756—Construction of passageway—Mine foreman—Negligence of mine foreman—Constructive notice of defect—Contributory negligence—Nonsuit. Cossette v. Paulton Coal Min. Co., 520.*

3. *Negligence—Master and servant—Damages—Measure of damages—Evidence—Character of treatment for injuries—Cross-examination of plaintiff. Clark v. Butler Junction Coal Co., 262.*

4. *Negligence—Master and servant—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to*

MINES AND MINING—continued.

warn of danger—Instruction—Delegation—Custom—Fellow servant—Case for jury. Jellie v. Jamison C. & C. Co., 447.

MORTGAGES.

1. *Decedents' estates—Death of mortgagor—Scire facias against heirs—Failure to join administrator—Affidavit of defense—Insufficiency. Herron v. Stevenson, 354.*

2. *Foreclosure—Assignment—Production of bond—Defenses—Evidence—Practice, Supreme Court—Question not raised below.*

The production of a bond secured by a mortgage is not essential to recovery in an action on the mortgage.

The question whether the assignment of a mortgage absolute on its face was in point of fact subject to the right of redemption by the assignor upon payment by him of a debt owed the assignee will not be considered by the Supreme Court where it has not been raised in the court below.

Where in an action of scire facias sur mortgage the defense was that the use-plaintiff's title was defective, that the mortgage was not the absolute property of the party who had assigned it to the use-plaintiff, but was held as collateral for a debt, but where the assignor of the use-plaintiff testifying for defendant stated that he had received the mortgage by assignment absolute on its face as security for the payment of \$3,000, one-half of which was to be paid in cash and the balance by a transfer to the witness of a promissory note, that all was to be paid at the maturity of the note, and that if not so paid the assignment of the mortgage was to be absolute, that upon maturity the note remained unpaid, so that the assignment by the terms of the agreement testified to by defendant's witness became absolute, the evidence presented did not constitute a defense to the action and the trial judge made no error in directing a verdict for plaintiff. *Anderson v. Kern, 81.*

3. *Real property—Merger—Dower interest—Assignment of dower interest to owner in fee—Assumpsit for dower. Griffith v. McKeever, 605.*

MOTIONS AND RULES.

1. *Equity Rule 10—Construction of dam—Overflowing of waters—Dam partly in another county—Bill by riparian owner—Relief affecting entire dam—Relief in personam—Equity jurisdiction—Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 13, 1836, P. L. 568; March 17, 1856, P. L. 388; April 6, 1859,*

MOTIONS AND RULES—continued.

P. L. 389; April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847. Vandersloot v. Penna. W. & P. Co., 99.

2. *Equity Rules 81 and 82—Injunction—Bond—Affidavit—Receivers—Protection of property—Acts of March 21, 1806, & Sm. L. 326; May 6, 1844, P. L. 564, Sec. 1, and June 16, 1836, P. L. 784. Baur v. Wilkes-Barre Light Co., 115.*

3. *Motion for new trial—Charge of court—Failure to request—Contracts—Suretyship—Coal lands—Receipts—Explanation—Evidence—Legal effect of receipt—Excessive verdict. Pittsburgh Block Coal Co. v. Oliver Coal Co., 290.*

4. *Rule to strike off judgment—Laches—Res adjudicata—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments—Discretion of court. Bowman v. Berkey, 327.*

MUNICIPAL LAW.

1. *Municipalities—Negligence—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing of wire in mud with broom—Splashing of mud—Injury to eye Proximate cause—Court and jury—Judgment for defendant n. o. v. Bruggeman v. York, 94.*

2. *Official bonds—Default—County auditors—Audit—Failure to appeal—Sureties—Liability for defalcation of principal—Judgment for defendant.*

An action at law will not lie on an official bond until there has been an accounting before the county auditors, who constitute a special tribunal, created by statute for the purpose of adjusting the accounts of such officers and determining the amount due to or from them. This decision, unappealed from, is conclusive and precludes an action at common law for an unadjudicated account.

The sureties on an official bond given by the treasurer of the directors of the poor, will not be liable for an embezzlement committed by the principal, where it appears that the books, vouchers and other documents, relating to the accounts of the treasurer, were submitted to the county auditors and audited, and no defalcation was found; and it is not material that the attention of the auditors was not called to the items for which the action was brought. *Snyder v. Berkey, 489.*

MURDER, see Criminal Law.

NAMES.

1. *Confusion of names—Corporations—Equity. Peoples Trust Co. v. Safe D. & T. Co., 62.*

NEGLIGENCE.

1. *Automobiles—Railroads—Contributory negligence—Guest—Testing danger.*

It cannot be said as a matter of law that a guest or passenger in a vehicle is guilty of negligence because he has done nothing. In many such cases the right degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in results.

In an action to recover damages for personal injuries sustained by the plaintiff in a collision between plaintiff's automobile and a railroad train, it appeared that plaintiff, a clergyman, was riding in the automobile as a guest of one of his parishioners who had sent the automobile for him. The automobile was driven by the chauffeur of the parishioner. The collision was the result of joint negligence in the operation of the train and the automobile. Both the plaintiff and the chauffeur were familiar with the streets over which they were to pass and both knew of the railroad crossing where the accident occurred. There was evidence that plaintiff when about 100 feet from the railroad track heard a noise which seemed to him the noise of an approaching train; that the driver was then going about fifteen or twenty miles an hour; that plaintiff called to him to stop—which call the driver said he did not hear—and the next thing plaintiff knew the automobile was in collision with the car. The lower court entered a compulsory nonsuit. *Held*, error, and that the case was properly for the jury. *Vooca v. Penna. R. R. Co.*, 42.

2. *Contributory negligence—Fall of brick arch on workman—Assumption of risk—Conflicting evidence—Preponderance of evidence with defendant—Case for jury—Master and servant—Bricklayer.* *Van v. Richmond*, 300.

3. *Defective sidewalk—Flagstone—Roots of trees—Liability of property owner—Case for jury.*

In an action by a pedestrian to recover for personal injuries resulting from a defect in a sidewalk causing her to trip and fall, the case is for the jury and a verdict and judgment for the plaintiff will be sustained where it appeared that at the point of the accident the outer edge of the flagstone pavement had been raised to a height of from four to six inches at the surface by the growth of the roots of a tree; that at the time of the accident it was almost dark, snow was falling and nearly two inches of snow covered the ground; that plaintiff was looking in front of her for a distance of from four to six feet and

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did not see the defect in the sidewalk until she had fallen, and while still on the ground discovered the cause of her accident. **Campbell v. Vincent**, 419.

4. *Master and servant—Brewing company—Moving machinery—Change in operation—Increased danger—Failure to notify employee—Contributory negligence—Instructions to jury—Failure to request—Earning power—Charge of court—Pleading—Variance.*

If the operation of a machine prior to changes is not attended with danger and changes, involving danger, are made without notice to or knowledge of an employee and in the exercise of ordinary prudence he would not observe such changes, it is the duty of the employer to notify him thereof, and failure to do so is negligence.

In an action by an employee against a brewing company to recover damages for personal injuries resulting from his arm being caught in the revolving cogs of a machine, the questions of defendant's negligence and the contributory negligence of the plaintiff were for the jury and a verdict and judgment for the plaintiff will be sustained where it appeared that it was the duty of the plaintiff, who was on night turn, to remove from time to time the malt which accumulated in the gear boxes of the malt dryer, a cylindrical drum revolving by means of cog wheels connected with the driving shaft; that in the performance of such services plaintiff was required to go to the rear of a chute which fed the dryer and to stand within a narrow space between the chute and reach over the gear, which had for many years been revolving outward and was therefore not dangerous; that nine days prior to the accident defendant changed the operation of the cog wheels so that they revolved inward instead of outward; that defendant did not notify plaintiff of such change and plaintiff was not aware thereof and could not observe same on account of the darkness of the place and the rapidity with which the cogs revolved; and while in the act of removing the malt his arm was caught in the cogs and he sustained the injuries complained of.

In such case the plaintiff was justified in assuming that the wheels were still revolving outward.

Where it appeared that the weekly wage of the plaintiff was the same after as before the accident, the court did not err, after referring to such fact, in charging that "it is for loss of earning power in the future that you are to compensate him, if anything." In other words, what would he continue to earn in the future had this accident not have happened, and that

NEGLIGENCE—continued.

for a period of the balance of his life? The test is whether the power or capacity to earn has been diminished as a result of the injury and the earnings of the plaintiff subsequent to the injury, as compared with his earnings prior to the injury, are evidence, but not conclusive, as to whether his earning power has been diminished by reason of the injury. **Yeager v. Anthracite Brewing Co.**, 128.

5. *Master and servant—Cab company—Hire of team and driver—Driver assisting in hirer's work—Special and general employment—Negligence of driver—Injury to hirer's employee—Action against cab companies—Respondeat superior—"Carriage cases" distinguished.*

There can be no recovery against one charged with negligence upon the principle of respondeat superior unless it be made to appear that the relation of master and servant in fact existed, and that the servant was within the scope of his employment.

Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continues to subject to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.

In an action against an express company brought by an employee of an electric company to recover for personal injuries, it appeared that the electric company had hired from the defendant the services of a horse, wagon and driver to assist in the erection of poles and wires; that the defendant sent each morning to the electric company a man and wagon to remain in their service during the day; that the employees of the electric company rode in the wagon, and that the material to be used in putting up wires and poles was carried in it whenever occasion required; that the duties of the driver were to drive wherever he was directed by the electric company's foreman, to assist with the team in pulling down and putting up poles pursuant to the direction of the foreman; that the driver, in response to plaintiff's request to hand him a chisel threw it to him in such a manner as to strike him on the knee, causing the injuries complained of. *Held*, the driver was under the direction and control of the foreman of the electric company and, therefore, in the latter's special employ at the time, and a compulsory nonsuit was properly entered.

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Plaintiff failed to show affirmatively that handing tools from the wagon was a duty which defendant company engaged to perform, or that defendant employed the driver to discharge that duty.

The "carriage cases" are distinguished from this case by the fact that in those cases the driver is only under the control of the hire to the extent of indicating the destination to which the latter wishes to be driven. **Fahlman v. Excelsior Express and Standard Cab Co.**, 393.

6. *Master and servant—Calling another to assist servant—Injuries to the person called—Judgment for defendant n. o. v.*

While the relation of master and servant cannot be imposed upon a person without his consent, express or implied, a servant may engage an assistant, in case of an emergency, when he is unable to perform the work alone, and such assistant becomes, for the time being a servant of the master whose employee engaged him.

Where in such an emergency such temporary employee is injured in consequence of defects in the premises upon which he is requested to work he may hold the master of the servant who called him to assist liable for such injury but in such case he must establish that an emergency existed sufficiently great to warrant the calling upon him for aid.

Where the driver of a motor truck, owned and operated by a brewing company, lost his way and requested a friend to ride with him to point out the direction in which he should go, and the friend of such driver complied with such request and rode for a distance in the motor truck and was injured in consequence of defects therein, he could not hold the owner of the motor truck liable for such injuries in the absence of anything to show that his presence on the truck was necessary to guide the driver to the proper road, particularly where it further appeared that the way was easy to find and that a description thereof would have been sufficient. **Byrne v. Pitts-burgh Brewing Co.**, 357.

7. *Master and servant—Death of workman—Parties defendant—Corporations—Identity of master—Evidence—Hearsay—Declaration of agent—Charge of court.*

In an action to recover damages for the death of plaintiff's husband, where it appeared that deceased was in the employ of a clay products company and that he was killed while at work, by the fall of a derrick constructed for the purpose of cleaning out a gas well owned by and located upon the property of an oil company, that the two companies had certain officers in

NEGLIGENCE—*continued.*

common and that the oil company furnished natural gas used by the products company in the operation of its plant, it was reversible error for the court to charge that the defendant would be liable if the jury found that the two corporations were in fact one and the same, where there was no evidence to support the charge.

Hearsay evidence of a declaration on admission by an agent made after the accident is inadmissible.

Where it appeared that the superintendent of a defendant corporation was dead at the time of trial, it was not proper to permit witnesses to testify as to declarations made to them by such superintendent after the accident, to the effect that he did not want plaintiff's husband to go to a well, but he finally let him go and that in the end he had plainly told deceased to go to the well.

Had there been express testimony by some one who had actually heard the order alleged to have been given by the superintendent to the deceased to report at the well, and had the defendant denied the giving of such order, the alleged declaration might have been admitted in rebuttal.

Where it appeared that, on the day of the accident, defendant's superintendent, with the knowledge and consent of defendant, permitted deceased and other workmen under his control to work about the wells of the oil company it was for the jury to determine whether, in view of the close relations existing between the two companies, the deceased was working for the products company at the time of the injury, or whether, as contended by defendant, he was working for the oil company, or whether he was a mere volunteer. **Brown v. Kittanning Clay Products Co.**, 267.

8. *Master and servant—Defective scaffold—Fall of workman—Safe place to work—Employer's duty to inspect and repair—Delegation of duty—Foreman—Vice-principal—Obvious danger—Assumption of risk—Contributory negligence—Case for jury.*

A scaffold is a place to work and in the erection thereof the employer is providing a place to work, and, if through failure of duty to make it reasonably safe an injury results to another, he is responsible.

It is the duty of the employer not only to furnish safe timbers for a scaffold and to have it properly constructed, but also to maintain it in reasonably safe condition by inspection and repair.

NEGLIGENCE—continued.

An employee must know the circumstances and appreciate the risk before he will be held to have assumed it. He is not equally bound with his employer to know whether appliances are reasonably safe and in ordinary use and does not assume the risk upon the employer's failure to provide such as are proper.

In an action against a construction company to recover for the death of plaintiff's husband occasioned by the breaking of a scaffold upon which he was working while in defendant's employ, the case was for the jury and a verdict and judgment for plaintiff will be sustained where it appeared that the scaffold had been erected by other men in defendant's employ about two or three weeks prior to the accident, which occurred on the first day deceased worked on the building and about an hour after he began work; that the timber used in the broken beam was defective in not being sufficiently large for the purpose of carrying the weight for which it was intended, that it contained wind-shakes or cracks and numerous knots, many of which extended entirely through the timber and could be seen externally before and after the accident, and that they weakened the beam and thereby diminished its carrying capacity; and that no inspection of the scaffold had been made subsequent to its construction and prior to the accident by which the defects could and should have been discovered and remedied.

In such case the duty to provide a safe place to work was a nondelegable duty and there is no merit in defendant's contention that although the foreman who made the selection of the timber was a vice-principal there was no evidence of his incompetency and his mistake therefore did not amount to negligence. *Swartz v. Bergendahl-Knight Co.*, 421.

9. Master and servant—Electric company—Wires—Defective transformers—Notice—Death of lineman—Presumption of care—Contributory negligence—Conflicting facts—Case for jury.

Where a lineman employed by an electric company is killed while working around live wires on a telegraph pole he is presumed to have used care.

Where the facts or inferences upon which the question of contributory negligence depends are in doubt that question, if controlling, must be submitted to the jury.

In an action against an electric company to recover for the death of plaintiff's son, who was employed by defendant as a lineman, the question of defendant's negligence and the con-

NEGLIGENCE—continued.

tributory negligence of the decedent are for the jury where it appears that defendant's foreman, a vice-principal, directed decedent to connect certain wires at or near a transformer, which had been out of repair and in a leaky condition for some time and to such an extent as to electrify the metal case, of which fact defendant had notice; that decedent climbed the pole pursuant to such direction and immediately came in contact with the transformer, apparently by his arm touching the live case as he put it in the four-inch space between the case and the buck-arm while fastening his safety belt around the pole; that decedent had been employed as a lineman for from ten to twelve months and was ranked in the lowest of three classes of workmen as to experience and efficiency; and although he had been instructed as to the dangers of the business and warned not to touch a transformer case, he had not been warned of the defective condition of the transformer in question. **Faulk v. Duquesne Light Co.**, 389.

10. *Master and servant—Mines and mining—Bituminous Coal Mine Act of June 9, 1911, P. L. 756—Construction of passageway—Mine foreman—Negligence of mine foreman—Constructive notice of defect—Contributory negligence—Nonsuit.*

The rule that under the general provision of the mining acts placing the workings under the mine foreman's charge and supervision, and under certain special provisions thereof, the foreman is responsible for all work in the course of the construction of passageways, expressed with reference to prior statutes, is applicable to the Act of June 9, 1911, P. L. 756.

In an action against a mining company to recover for injuries sustained by an employee in consequence of the fall upon him of slate from the roof of a newly constructed passageway, a compulsory nonsuit was properly entered where it appeared that the passageway was being constructed under the supervision of the mine foreman; that his attention was called to the dangerous condition of the roof, but that it was not remedied; that no signal was placed to warn employees of the danger; that the foreman told plaintiff and other workmen that they could use the passageway, and that the next day, while plaintiff was using it, a portion of the roof fell, causing the injuries complained of.

In such case had the new entry been completed a sufficient period of time before the accident to fix the defendant with constructive notice of the defect therein, or had the latter received express notice of its faulty condition, or had the way

NEGLIGENCE—*continued.*

existed for such a length of time as to become part of the established plant, or had it been in use as a regular, completed passage, the defendant might have been held liable.

It seems plaintiff was not guilty of contributory negligence under the facts of this case. **Cossette v. Paulton Coal Min. Co.**, 520.

11. *Master and servant—Mines and mining—Damages—Measure of damages—Evidence—Character of treatment for injuries—Cross-examination of plaintiff.*

In an action for personal injuries, where it appears that at the time of the accident, plaintiff was engaged in an occupation yielding him a low wage, it is nevertheless competent for him to prove that he is skilled at other occupations paying a higher wage, especially where it appears that his inability to pursue a more profitable occupation at the time of the injury was due to a temporary condition in the financial and industrial world.

In such case, however, it was error to permit the plaintiff to express a guess as to what wages he could earn at the more profitable occupation, in the absence of evidence as to the general wage scale for such labor or that the witness was distinguished by superior capacity over others in his class of employment.

Where in an action for personal injuries the plaintiff testifies as to the extent and character of his injuries and the pain and suffering he endured, the defendant is entitled to cross-examine him as to what he did or failed to do in order to obtain relief and improvement, and it is error for the court to refuse to allow plaintiff to be cross-examined with respect to the medical and surgical treatment he received, if any, immediately following the injury.

Where in an action against a coal mining company the negligence charged was in allowing an uncovered hole to be in the path of an employee whose daily task was to push loaded cars over the hole, it was no part of the plaintiff's case to show that the maintenance of such hole was exceptional, and out of the usual custom of the operation of coal mines, and an objection to the admission of such evidence, should have been sustained. **Clark v. Butler Junction Coal Co.**, 262.

12. *Master and servant—Mines and mining—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to warn of danger—Instruction—Delegation—Custom—Fellow servant—Case for jury.*

Where an employer delegates an older and experienced fellow servant of an inexperienced employee to instruct and quali-

NEGLIGENCE—*continued.*

fy him for service, the employer is liable for the negligence or omission of the instructor, if, by reason of it, the employee suffers injury. A servant delegated to instruct the employee stands for this purpose in the place of the employer.

In an action against a coal mining company to recover for personal injuries sustained by a minor in defendant's employ due to the failure of the defendant to give him proper instructions as to the danger to which he might be subjected from unexploded charges having been left in the coal where he was directed to work or as to the proper method of avoiding injury from such unexploded shots the case is for the jury and a verdict for plaintiff will be sustained where it appeared that prior to the accident plaintiff had been employed in various coal mines for fourteen months but with a limited experience in the use of explosives; that as a rule he had worked with experienced miners but on the morning of the accident was working alone digging coal when he stuck his pick into the coal at a point five or six inches from a hole and an explosion immediately followed, causing the injuries complained of; that plaintiff was ignorant of the danger from unexploded shots in the coal, and had never been warned to look out for them or instructed as to the proper method of guarding against injury from them, although the testimony tended to show a custom to give such instruction.

In such case, although the failure to report the existence of the unexploded charges was due to the negligence of another miner, a fellow workman of the plaintiff, the fellow-servant rule is not applicable. **Jellie v. Jamison C. & C. Co.**, 447.

13. *Master and servant—Railroad company—Safe place in which to work—Assumption of risk—Case for jury.*

Where in an action against a railroad company to recover for personal injuries sustained by an employee standing on a ladder on the side of a moving freight car, in the discharge of his duties, being caught between such car and a car on the next track, it appeared that there was not sufficient clearance between the two tracks to afford a safe place for plaintiff to work; that the plaintiff did not know that the clearance between the tracks was less than the standard clearance and was insufficient, but had walked between cars standing on such tracks hundreds of times before in safety, the clearance ordinarily being eighteen inches; and that at the time of the accident he was caught by reason of the sudden lurching of the car on the next track, the question of defendant's negligence and plaintiff's assumption of risk were for the jury, and

NEGLIGENCE—continued.

a verdict for the plaintiff will be sustained. *Lamb v. Penna. R. R. Co.*, 536.

14. *Master and servant—Safe place to work—Fall—Subcontractors—Injuries to workmen—Liability.*

Where an employer, in disregard of actual or constructive notice of a defect in the supports on which his work is designed to rest, proceeds without correcting the same and injury results to his employee in consequence of this disregard, the law will hold him guilty of culpable negligence, but no legal presumption of negligence arises in the first instance from the accident itself, to take the place of proof of negligence or to shift the burden of proof.

A master is not liable for the injury to his servant caused by hidden defects or dangers in the machinery, appliances or premises furnished to a servant, when such defects or dangers were unknown to the master and were not discoverable by the exercise of reasonable care and skill in inspecting them and when there is nothing in external appearances to create a suspicion of their presence.

A manufacturing company was enlarging its plant under a contract with an experienced builder, in accordance with plans and specifications prepared by competent architects. It made a separate contract with a fire extinguishing company for the erection of a fire extinguishing apparatus, which included the construction of a tank upon foundations and supports to be provided by the manufacturing company. The contract for the tank was sublet by the fire extinguishing company and a suitable tank was erected upon the supports. The tank was filled with water and while a workman in the employ of the fire extinguishing company was at work beneath the tank, the supports gave way, and the tank fell causing serious injury to such workman. The fire extinguishing company had no notice that the supports were insufficient. In an action against the fire extinguishing company brought by such workman plaintiff contended that defendant had failed to furnish him with a safe place to work. The court decided that the defendant was not liable for defects in the supports, of which it was not aware and over which it had no control, and directed a verdict for defendant upon which judgment was entered. *Held*, no error. *Moran v. Gen. Fire Extinguisher Co.*, 168.

15. *Master and servant—Safe place to work—Proximate cause—Minors under sixteen—Employment—Factory Act of April 29, 1909, P. L. 283—Violation—Duplicate lists—Posting of lists—Burden of proof—Exception.*

NEGLIGENCE—continued.

In an action against a glass manufacturing company to recover for personal injuries sustained by an employee, where it appeared that plaintiff was engaged in hauling glass plates to the cutter on a small truck and placing the glass in racks behind the cutter's table; that while plaintiff was removing a plate from the truck he collided with the cutter, a fellow workman, causing the plate to fall and injure plaintiff's foot; that there was a space of only three and one-half feet between the rack and the cutter's table; that such space was insufficient for both plaintiff and the cutter to work in, and the insufficiency of the space was the cause of plaintiff's collision with the cutter, there was sufficient evidence that defendant had not provided plaintiff with a reasonably safe place in which to work and a verdict for the plaintiff will be sustained.

The provision of the Factory Act of April 29, 1909, P. L. 283, requiring the keeping and posting of lists of minors, is mandatory and not merely directory. Where a minor under the age of sixteen years is employed in a factory and is injured, the burden is upon the employer, in an action for such injuries, to show that in employing such minor it brought itself within the exceptions to the express provisions of the statute, prohibiting the employment of minors of this age in its factory, and if it fails to meet this burden the law refers the injury sustained by the employee to the criminal wrong of the employer as its proximate cause.

Where in such case it appeared that plaintiff was a minor under the age of sixteen years and that defendant had violated the Factory Act of April 29, 1909, P. L. 283, in failing to keep two lists of minors under such age employed in the establishment, and in failing to post one list in the department in which plaintiff worked, the defendant was guilty of negligence and such negligence was in law the proximate cause of the accident and a verdict and judgment for plaintiff were sustained. **Chabot v. Pittsburgh Plate Glass Co.**, 504.

16. *Municipalities—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing of wire in mud with broom—Splashing of mud—Injury to eye—Proximate cause—Court and jury—Judgment for defendant n. o. v.*

A proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of. A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such

NEGLIGENCE—continued.

prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury.

The injury must be the natural and probable consequence of the negligence; such a consequence as under the circumstances might and ought to be foreseen by the wrongdoer as likely to flow from his acts.

The facts being undisputed the question of proximate cause is for the court.

In an action against a municipality to recover damages for personal injuries it appeared that the defendant had raised the grade of a lot causing water and mud to overflow plaintiff's sidewalk; that plaintiff, while sweeping off the sidewalk, in an effort to remove a coil of wire which had become lodged in the pavement or gutter pushed it with her broom so that it sprang back and sent a splash of the street mud into her eye, causing the loss of the sight thereof. *Held*, the pushing of the coiled wire and not the presence of the mud was the proximate cause of the accident and judgment was entered for the defendant non obstante veredicto. **Bruggeman v. York, 94.**

17. *Oil companies—Fires—Origin—Engines—Hot tube method—Dangerous machinery—Custom of business—Proximate cause—Case for jury.*

In an action against an oil company to recover damages for injuries to plaintiff's premises caused by fire alleged to have been communicated from defendant's pumping station, the case is for the jury and a verdict for the plaintiff will be sustained where it appeared that the engines in such station were equipped with the hot tube method of ignition causing an open flame to come in contact with escaped oil, and such method of operation was more dangerous than that customarily in use.

In such case plaintiff was not bound to exclude by her proofs every possible theory as to the fire's origin at variance with her own, but was required only to exclude every other reasonable theory. **Ramage v. P. & R. Oil Co., 491.**

18. *Railroad crossings—"Stop, look and listen"—Presumption—Contributory negligence—Burden of proof—Nonsuit—Evidence—Leading question.*

While the plaintiff is bound to prove negligence on the part of defendant in an action for personal injuries and that this negligence was the cause of the injury, he is not bound to go further and prove that he did not contribute to the result by his own negligence. That burden is on defendant unless the evidence produced discloses contributory negligence.

NEGLIGENCE—continued.

The rule of *Carroll v. Penna. R. R. Co.*, 12 W. N. C. 348, applies only where a person enters upon a railroad track, and is struck by a moving train so instantaneously as to raise a legal presumption that he did not stop, look and listen, and to rebut any presumption that he had done so. Where there is a doubt as to the negligence upon the part of the plaintiff the case is for the jury.

In an action against a railroad company to recover damages for personal injuries sustained in a grade crossing collision, where it appeared that at the place where the accident occurred the defendant maintained six tracks, and that approaching the tracks from the direction from which the plaintiff came there were two side tracks, an open space twenty-four feet in width, and then four main tracks; that as plaintiff approached the side tracks he stopped and looked up and down the tracks and waited for a freight train to pass; that he then crossed the side tracks, and while in the space between the side tracks and main tracks looked up and down and heard no train coming but did not stop, although there was sufficient space for him to do so; that the rear of plaintiff's sled was struck just as it was about to cross the far rail of the last main track, the question of plaintiff's contributory negligence, including the question whether he should have stopped again after entering upon the side tracks, is for the jury.

The common law rule is that a question is leading where it embodies the material facts, and admits of an answer by a simple affirmative or negative; but in modern times this rule has been somewhat departed from by a number of decisions which hold that such a categorical question is not necessarily leading, providing of course that it is not so framed as to give an intimation as to which answer is desired.

Where in an action for injuries sustained at a railroad grade crossing plaintiff's counsel asked "Did you hear any train coming down?" and plaintiff answered, "No," and thereupon plaintiff was asked "Did you listen for a train coming down?" the contention that the question was leading was without merit, and the court erred in sustaining an objection thereto.

In such case the question "Were you in a position where you could have heard the whistle of that train if it had been blown?" put to one of plaintiff's witnesses on direct-examination, does not indicate the answer desired and therefore is not leading and was erroneously excluded by the trial judge. *Waltosh v. Penna. R. R. Co.*, 372.

NEGLIGENCE—continued.

19. Railroads—Ejection of passenger at dangerous place—Damages—Compensatory and exemplary damages—Pleadings—Statement of claim—Amendment—Departure—Measure of damages—Present worth—Instructions—Failure to request more specific instructions.

In an action of tort, damages necessarily following as a natural and probable result of the injury may be proved without special averment as defendant will be presumed to be aware of such consequences of his conduct, and hence cannot plead surprise when proof of such injury is made. Damages of a special nature and not the usual consequences of the wrong complained of, however, must be specially averred that defendant may be informed of the claim and given an opportunity to prepare his defense; but where the action is for injuries to the person the jury may consider, without special averment, pain and suffering, expense incurred for medical treatment and loss of time caused by inability to work at the usual occupation of the injured person, inasmuch as these are the natural and usual results of an injury.

In an action to recover damages for death of plaintiff's husband due to the alleged negligence of the employees of defendant railroad company in ejecting deceased from its car at a dangerous place, in consequence of which he was killed by a passing train, defendant complained of the admission in evidence of matters tending to show loss of earnings and profits of deceased as a farmer as a basis for compensatory damages, where plaintiff's statement claimed exemplary and punitive damages only. The statement first contained an averment that plaintiff claimed damages "in the sum of twenty-five thousand dollars (\$25,000) and in addition to the above sum claims punitive damages from said defendant company, upon a cause of action whereof the following is a statement." Succeeding paragraphs set forth the manner in which deceased met his death, and that his loss of life was due to defendant's employees "wilfully, wantonly, knowingly and unlawfully" ejecting him from its train at a dangerous place. Plaintiff also averred deceased's occupation was that of a farmer and that he "derived great gains and emoluments from tilling the soil and kindred industries, a large portion of which went to the maintenance and support of her and her family," of which she had been deprived through the negligence of defendant. Plaintiff also claimed to recover for funeral expenses, and for the loss of the companionship of her husband. The concluding paragraph stated: "Wherefore, and by reason of which, she claims

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damages in the sum of twenty-five thousand dollars as exemplary damages, and in addition thereto she claims punitive damages for the wilful, wanton, reckless, careless and unlawful conduct" of defendant's employees. Plaintiff admitted the terms "exemplary damages" and "punitive damages" were synonymous in practice, and claimed the word "exemplary" was inserted in the statement by mistake for the word "compensatory." No offer to amend in this respect appears to have been made but, in dismissing defendant's motion for a new trial, the court below held the testimony offered as to loss of earnings was fully covered by the paragraph of the claim relating to the occupation of deceased and that the limitation in the concluding paragraph did not necessarily prevent the introduction of evidence to show compensatory damages. Defendant did not plead surprise and case was tried on above theory. *Held*, no error.

The error in the statement might have been amended at any time since it would not set up a new cause of action barred by the statute of limitations. The cause of action being the wrongful act of negligence resulting in the injury to the plaintiff, an amendment merely adding an additional item of claim for damages issuing out of the same wrongful act is not a departure.

In such case, in charging on the measure of damages based on the earnings of the deceased, the court said that in fixing the amount of earnings the jury should consider the age, health, ability and disposition to labor and the habits of living of deceased and referred to the testimony touching the extent of his farming occupation. *Held*, that although the instruction in this respect was brief it was not erroneous and in the absence of a request from defendant for further specific instructions, did not constitute reversible error.

In such case, in instructing the jury on the question of the present worth of future earnings, the court charged: "So far as compensation depends or is estimated upon future earnings or accumulations, such earnings or accumulations are to be anticipated and capitalized and their present worth determined. That is, what lump sum paid now would be their equivalent?" *Held*, that the instruction, although brief, was a correct statement of the law and that in the absence of a request for more extended charge, did not constitute reversible error. *Leonard v. B. & O. R. R. Co.*, 51.

20. *Railroads—Evidence—Res gestæ—Conversation—Rulings by trial judge—Questions considered on appeal.*

NEGLIGENCE—continued.

In negligence cases where the actual occurrence is confined to a brief space of time, the *res gestæ* of the transaction is accordingly limited, and the period when declarations become merely a narrative of a past occurrence ordinarily begins immediately after the accident. If the transaction is complete and ended, its ending marks the limitation of the *res gestæ* of the event and declarations subsequent thereto become merely narrative of past matters.

In an action against a railroad company to recover damages for death of plaintiff's husband through alleged negligence of defendant's employees in ejecting him from its car at a dangerous place, the admission of evidence over defendant's objection of a conversation between the conductor of the train and the witness shortly after deceased had been ejected and after the train had departed from the next station after receiving and discharging passengers at that stop, was reversible error.

Where plaintiff's evidence as to a conversation after the accident was objected to as not being pertinent and plaintiff's counsel urged its competency because of "its happening so close to the time" and immediately afterwards the trial judge overruled defendant's objection, it cannot be urged on appeal that the question of *res gestæ* was not considered or ruled in the court below. **Leonard v. B. & O. R. R. Co.**, 51.

21. *Railroads—Grade crossing—Pedestrians—Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Absence of lights on engine—Engine visible—Harmless error—Directed verdict for defendant.*

Where a pedestrian is deaf a higher degree of care is imposed upon him at a railroad grade crossing.

When a pedestrian walks in front of a moving train, in spite of the information afforded by his eyes and ears and is immediately struck, he is guilty of contributory negligence.

It is a traveler's duty to keep a lookout while crossing railroad tracks as well as to stop before attempting to cross.

In an action against a railroad company to recover damages for death of plaintiff's husband, occasioned by his being struck by a locomotive at a grade crossing, a verdict was properly directed for defendant where it appeared that at the crossing in question there was a single track line with a switch on the near side; that plaintiff stopped, apparently to look and listen just before crossing the switch track, that no bell or whistle was sounded but that the evening was clear and de-

NEGLIGENCE—*continued.*

ceased could have seen the engine in time had he looked; and that deceased was struck immediately after stepping upon the track.

In such case, where defendant's evidence was that the headlight and other lights on the engine were burning, the court improperly excluded evidence in rebuttal to show that there was no headlight on the engine, on the ground that such evidence should have been presented as part of plaintiff's case in chief; but where it appeared that the engine was clearly visible as it approached the crossing, such evidence could not have changed the result and its rejection was harmless. *Krena v. Pittsburgh, C., C. & St. L. Ry. Co.*, 443.

22. *Railroads—Locomotive whistle—Deafening of fireman on locomotive on next track—Interstate commerce—Federal Employer's Liability Act—Fellow-servant rule—Failure to warn of blowing of whistle—Common knowledge—Evidence—Custom to warn—Admissibility.*

When a locomotive fireman, employed by a railroad company on an engine engaged in drawing a train in interstate commerce, is injured, the Federal law governs and the fellow-servant rule is not applicable.

Where in an action by a locomotive fireman against a railroad company, engaged in interstate commerce, by which plaintiff had been employed, to recover for injuries to his hearing caused by the blowing of the whistle of another locomotive standing upon an adjoining track and within ten feet of plaintiff, it appeared that suddenly and without warning two loud shrill blasts were emitted from the whistle, and that plaintiff immediately felt a pain in his ear, and thereafter became totally deaf in such ear, but where there was no evidence to justify a finding that the experience or knowledge which an engineer might be expected to have should have warned the engineer who blew the whistle that he should first give notice to the plaintiff, the jury were not warranted in finding that defendant or its servants had reason to anticipate that the blowing of the whistle was likely to affect plaintiff injuriously, and a verdict for the plaintiff could not be sustained.

The effect upon bystanders of the blowing of a locomotive whistle, under such circumstances, is hardly a matter of common knowledge, and it must therefore be shown by evidence.

Where in such case it appeared that plaintiff offered to prove that it was customary to give warning to persons working within a distance of ten or fifteen feet of the whistle of an engine standing in the yard before the whistle was blown,

NEGLIGENCE—continued.

and that it was the general custom for those in charge of such an engine to look about for persons in close proximity to the engine whistle and to warn them that the whistle was about to be blown, the refusal of such offer on the part of the trial judge was error, and on appeal by the defendant from the judgment entered in favor of the plaintiff, the Supreme Court will not enter judgment for defendant *n. o. v.* but must grant a new trial **Royer v. Penna. R. R. Co.**, 438.

NEW TRIAL.

1. *After-discovered evidence—Cumulative evidence—Murder—First degree—Lying in wait—Evidence—Adverse witness—Cross-examination—Evidence of witness's previous statement—Threats—Ill feeling—Remoteness—Admissibility—Motive—Scope of cross-examination of defendant—Improper remarks of district attorney—Failure to object—Dying declaration—Conflicting declarations—Defenses—Alibi.* **Com. v. Delfino**, 272.

2. *Criminal law—Murder—Voluntary manslaughter—Involuntary manslaughter—Charge—Conflicting instructions—Erroneous instructions—Pointing gun to frighten—Evidence—Self-defense—Scope of direct examination of defendant.* **Com. v. Wooley**, 249.

3. *Order granting new trial—Judicial discretion—Practice,* **C. P. Fulginiti v. Diamond C. & C. Co.**, 344.

NONSUIT.

1. *Decedents' estates—Claim for domestic services.* **Farrow v. Boland**, 70.

2. *Evidence—Leading question—Negligence—Railroad crossings—"Stop, look and listen"—Presumption—Contributory negligence—Burden of proof.* **Walton v. Penna. R. R. Co.**, 372.

3. *Negligence—Master and servant—Mines and mining—Bituminous Coal Mine Act of June 9, 1911, P. L. 758—Construction of passageway—Mine foreman—Negligence of mine foreman—Constructive notice of defect.* **Cossette v. Faulton Coal Min. Co.**, 520.

4. *Partnerships—Existence of partnership—Evidence—Insufficiency—Going business—Assignment to alleged partners—Status of Assignees—Trustees—Tenants in common—Sharing of profits—Promissory notes—Assignment for creditors—Accounting—Commissions.* **First Nat. Bank v. Gitt and Delone**, 84.

NOTICE.

1. *Negligence—Master and servant—Electric company—Wires—Defective transformers—Death of lineman—Presumption of care—Contributory negligence—Conflicting facts—Case for jury. Faulk v. Duquesne Light Co., 389.*

PARENT AND CHILD.

1. *Failure of father to support child—Insanity of father—Death of father—Act of May 28, 1915, P. L. 580—Decree of adoption—Consent of mother—Subsequent proceedings by mother to set decree aside—Status of committee—Appeal—Certiorari. Helen Frances Young's Adoption, 573.*

PARKS.

1. *Appropriation of land—Boroughs—Eminent domain—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus—Courts—Power over process. Vickroy v. Ferndale Boro., 321.*

PARTITION.

1. *Real estate—Minerals—Owner of land only. Young's Estate, 206.*

PARTNERSHIPS.

1. *Existence of partnership—Evidence—Insufficiency—Going business—Assignment to alleged partners—Status of assignees—Trustees—Assignment for creditors—Accounting—Commissions—Tenants in common—Sharing of profits—Promissory notes—Nonsuit.*

A division of the product of property between tenants in common does not make them partners, although they may have contributed labor or money to raise it.

In an action on promissory notes against two defendants as copartners it appeared that the owner of a going business entered into a written agreement with the defendants under which he turned over his entire estate to them for the purpose of administration; that they were to convert the property into cash and apply the proceeds first to the payment of the claims of creditors, then to the payment of an annuity to the assignor, then to other purposes specified; and that defendants were to retain for themselves the residue which might be left after such payments had been made. It did not appear that any profits were made, or that the business was carried on for that purpose or that there was any understanding be-

PARTNERSHIPS—*continued*.

tween the defendants as to the sharing of profits, or that they held themselves out as partners to the plaintiff. The notes in question were given by one defendant and represented an old indebtedness of the assignor's business, such defendant endorsing the notes in the business name and individually. The other defendant had nothing to do with the negotiation of the notes. *Held*, the defendants were not partners but trustees, and a compulsory nonsuit was properly entered as to the defendant who did not endorse the note.

The transaction was in the nature of an assignment for benefit of creditors, involving an accounting; the residue representing commissions of the assignees. **First Nat. Bank v. Gitt and Delone**, 84.

PEDESTRIANS.

1. *Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Absence of lights on engine—Engine visible—Harmless error—Directed verdict for defendant—Negligence—Railroads—Grade crossing. Krenn v. Pittsburgh, C., C. & St. L. Ry. Co.*, 443.

PERPETUITIES, see Rule against.

PLEADING.

1. *Brewing company—Moving machinery—Change in operation—Increased danger—Failure to notify employee—Contributory negligence—Instructions to jury—Failure to request—Negligence—Earning power—Charge of court—Variance. Yeager v. Anthracite Brewing Co.*, 123.

2. *Landlord and tenant—Leases—Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Act of May 14, 1915, P. L. 483, Sec. 2—Practice, C. P.—Judgment on warrant—Framing issue—Evidence—Written instruments—Parol evidence—Fraud, accident and mistake. Williams v. Notopelos*, 469.

3. *Negligence—Railroads—Ejectment of passenger at dangerous place—Damages—Compensatory and exemplary damages—Statement of claim—Amendment—Departure—Measure of damages—Present worth—Instructions—Failure to request more specific instructions. Leonard v. B. & O. R. R. Co.*, 51.

PRACTICE, C. P.

1. *Affidavit of defense—Corporation defendant—Affidavit by person not officer—Insufficiency—Act of May 14, 1915, P. L. 483. Mintz v. Tri-County Nat. Gas Co., 477.*

2. *Affidavit of defense—Insufficiency—Mortgages—Death of mortgagor—Scire facias against heirs—Failure to join administrator. Herren v. Stevenson, 354.*

3. *Conditional appearance to set aside service—Waiver by defense on merits. Vandersloot v. Penna. W. & P. Co., 99.*

4. *Constitutional law—Const. of U. S., Art. I, Sec. 10, and Art. III, Secs. 16 and 21—Property rights—Payment of money by State without appropriation—Limitation of action against corporation—Banks and banking—Deposits—Failure to demand money within thirty years—Payment to State—Depositor's right against State—Contract subject to statute—Acts of April 17, 1872, P. L. 62, and May 11, 1909, P. L. 519—Validity—Affidavits of defense—Insufficient averments. Com. v. Dollar Savings Bank, 138.*

5. *Judgment on warrant—Framing issue—Evidence—Written instruments—Parol evidence—Fraud, accident and mistake—Landlord and tenant—Leases—Covenant not to alter without lessor's consent—Lessor's refusal—Good faith—Alleged condition—Construction—Forfeiture—Act of 32 Henry VIII, Ch. 34, Rev. Stat. 1—Pleadings—Act of May 14, 1915, P. L. 483, Sec. 2. Williams v. Notopoulos, 469.*

6. *Jurisdiction, C. P.—Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness—Boroughs—Contracts—Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Act of July 26, 1913, P. L. 1374. St. Clair Boro. v. T. & P. Elec. Ry. Co., 462.*

7. *New trial—Order granting new trial—Judicial discretion.*

Whenever a trial court is convinced that a verdict has been obtained through improper influence exerted upon witnesses, it is not only the right, but it is the duty of the court in the interest of public justice to order a retrial of the case.

A motion for a new trial is always an appeal to the discretion of the trial court, and the action of the lower court thereon is reviewable by the Supreme Court only as it can be made to appear that the court's action was a clear abuse of that discretion.

The action of a court in conditioning its grant of a motion for a new trial on the refusal by the defendant to pay a certain sum into court to the use of the plaintiff, in satisfaction

PRACTICE, C. P.—*continued*.

of all his claims and demands, is not free from criticism. **Fulginiti v. Diamond C. & C. Co.**, 344.

8. *Railroads—Relief fund—Death benefits—Suit at law—Recovery—Satisfaction—Subsequent claim against relief fund—Affidavits of defense—Sufficiency—Act of Congress of April 22, 1908.* **Getkin v. Penna. R. R. Co.**, 150.

9. *Statement of claim—Amendment—Departure—Measure of damages—Present worth—Instructions—Failure to request more specific instructions—Negligence—Railroads—Ejection of passenger at dangerous place—Damages—Compensatory and exemplary damages—Pleadings.* **Leonard v. B. & O. R. R. Co.**, 51.

10. *Statement of claim—Insufficiency—Affidavit of defense in nature of demurrer—Practice Act of May 14, 1915, P. L. 483—Contracts—Written contracts—Subsequent and parol agreement—Advancing time for completing work—Absence of provision as to increased compensation—Quantum meruit for increased cost.* **Robert Grace Cent. Co. v. N. & W. Ry. Co.**, 241.

11. *Workmen's compensation law—Award by Workmen's Compensation Board—Appeal to Common Pleas Court—Order remanding case to board—Erroneous order—Interlocutory order.* **Bakie v. Jefferson & Clearfield C. & I. Co.**, 534.

PRACTICE, SUPREME COURT.

1. *Appeals—Auditing judge—Findings of fact—Conclusiveness.*

In the absence of a clear and manifest error the findings of fact of an auditing judge on conflicting evidence will be sustained. **Edmundson's Estate**, 429.

2. *Appeals—Errors due to conduct of appellant's counsel—Defective assignments.*

In an action of assumpsit brought by a physician to recover compensation for professional services, where the controlling questions of fact and law were not numerous, intricate or confusing, but were made so by the conduct of counsel during the trial, and upon a review of the whole record, it appeared that, under the competent evidence submitted to the jury, there was no merit in the plaintiff's claim, a verdict for the defendant will be sustained although there might have been technical errors, resulting from the conduct of counsel at the trial, especially where the rules relating to assignments of error were violated. **Murray v. Smith**, 518.

PRACTICE, SUPREME COURT—continued.

3. *Appeal from order refusing to set aside service—Conditional appearance—Waiver by defense on merits.*

Defendant may appeal from an order refusing to set aside service where he has entered a conditional appearance for the purpose of taking such rule, or may defend the action on its merits. He is required to elect one of the two courses, and is bound by the legal consequences of the course elected. *Vandersloot v. Penna. W. & P. Co.*, 99.

4. *Assignments of error—Admission of evidence—Inadequate objection.*

Where evidence is objected to on inadequate grounds and admitted, the Supreme Court cannot reverse on adequate grounds urged on appeal but not suggested below. *Brown v. Kittanning Clay Products Co.*, 267.

5. *Assignments of error to exceptions to adjudication—Failure to quote decree.*

Assignments of error to exceptions to adjudicate in the Orphans' Court are not in proper form which quote the exceptions but not the ruling of the court thereon. *Hellinger's Estate*, 75.

6. *Equity—Final decree—Quashing appeal.*

Where on bill in equity no final decree is entered after overruling exceptions, a motion to quash the appeal will prevail, but in the absence of such motion the case will be decided on the merits. *Croyle v. Johnstown Water Co.*, 484.

7. *Question not raised below—Mortgages—Foreclosure—Assignment.* *Anderson v. Kern*, 81.

8. *Statement of questions involved.*

The only questions that will be considered on appeal are those presented by the statement of the questions involved. *Pittsburgh Ry. Co. v. Carrick Boro.*, 333.

9. *Workmen's compensation law—Award by Workmen's Compensation Board—Order remanding case to board—Erroneous order—Interlocutory order.* *Rakie v. Jefferson & Clearfield C. & I. Co.*, 534.

PRESUMPTIONS.

1. *Negligence—Railroad crossings—"Stop, look and listen"—Contributory negligence—Burden of proof—Nonsuit—Evidence—Leading question.* *Weltoosh v. Penna. R. R. Co.*, 372.

2. *Opening judgments—Discretion of court—Rule to strike off judgment—Laches—Res adjudicata—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof.* *Bowman v. Berkey*, 327.

PRESUMPTIONS—continued.

3. *Presumption against change—Probate of will—Jurisdiction, O. C.—Decedents' estates—Domicile of decedent—Change of domicile—Evidence. Barclay's Estate, 401.*

4. *Presumption of care—Contributory negligence—Conflicting facts—Case for jury—Negligence—Master and servant—Electric company—Wires—Defective transformers—Notice—Death of lineman. Faulk v. Duquesne Light Co., 389.*

5. *Presumption of care—Rebuttal of presumption—Railroads—Contributory negligence—Absence of lights on engine—Engine visible—Directed verdict for defendant—Negligence—Grade crossing—Pedestrian—Deafness—Degree of care—Death. Krenn v. Pittsburgh, C., C. & St. L. Ry. Co., 443.*

6. *Presumption of payment—Evidence—Judgments. Camp v. John, 38.*

7. *Set-off—Joint debt—Affidavit of defense—Insufficient averments—Corporation defendant—Affidavit by person not officer—Insufficiency—Act of May 14, 1915, P. L. 483—Practice, C. P.—Contract—Action on several contract. Mintz v. Tri-County Nat. Gas Co., 477.*

PRINCIPAL AND SURETY.

1. *Assignment of debt—Transfer of collateral security—Default—Sale of collateral—Application of proceeds to unsecured debt—Value of stock—Evidence—Discharge of surety.*

A purchase of a debt is a purchase of all securities for it, whether named or not named at the time of the assignment, unless expressly agreed at the time that they shall not pass.

A surety is entitled to every remedy which the creditor has against the principal, to enforce every security and all means of payment, and to stand in the place of the creditor, not only through the medium of the security pledged but even of securities taken without his knowledge.

If a creditor releases the principal from the payment of the debt, he thereby releases the surety entirely, but if he releases the principal from a part only, the surety is released only pro tanto.

While ordinarily the price obtained for an article in the open market is the best evidence of its value, where a creditor sells a pledged security on default of the debtor and buys it at its own sale and improperly applies the proceeds to a debt other than the one secured, such appropriation casts sufficient discredit upon the bona fides of the sale to warrant a finding that the real value of the security was greater than the price obtained.

PRINCIPAL AND SURETY—*continued*.

Where collateral pledged as security for a note upon which there is a surety is applied by the holder of the note to the payment of another obligation of the maker, without the consent of the surety, the surety is relieved from liability on the note *pro tanto*.

Where in such case the value of the collateral was sufficient to discharge the note and such collateral was sold and the proceeds applied to the payment of another obligation of the maker of the note, the debtor could not thereafter successfully claim any part of the proceeds of a sheriff's sale of the real estate of the surety, although his judgment was prior to that of other creditors. **Beaver Trust Co. v. Morgan**, 567.

PROMISSORY NOTES.

1. *Nonsuit—Partnerships—Existence of partnership—Evidence—Insufficiency—Going business—Assignment to alleged partners—Status of assignees—Trustees—Tenants in common—Sharing of profits—Assignment for creditors—Accounting—Commissions.* **First Nat. Bank v. Gitt and Delone**, 84.

PROVINCE OF COURT AND JURY.

1. *Case for jury—Beneficial associations—Insurance companies—Distinction—By-laws of society—Death benefits—Failure to include by-laws in certificate—Evidence—Unauthorized circular by officer—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7.* **LaFerty v. Supreme Council Cath. Mut. Ben. Assn.**, 452.

2. *Case for jury—Contracts—Debt and interest—Payment on account—Application of payment to principal.* **Kann v. Kann**, 583.

3. *Case for jury—Criminal law—Statute of limitations—Misdemeanors—Flight—Return—Concealment within State—Act of March 31, 1860, P. L. 427-450, Sec. 77—"Usual resident"—Words and phrases—Tolling of statute—Seduction—Promise to marry—Evidence—Sufficiency—Charge.* **Com. v. Weber**, 592.

4. *Case for jury—Master and servant—Bricklayer—Fall of brick arch on workman—Assumption of risk—Contributory negligence—Conflicting evidence—Preponderance of evidence with defendant.* **Van v. Richmond**, 300.

5. *Case for jury—Negligence—Automobiles—Standing trolley car—Alighting passenger passing around front of car—Collision with automobile between opposite bound tracks—Speed—Failure to blow horn—Cutting in front of street car—Con-*

PROVINCE OF COURT AND JURY—continued.

tributory negligence. *Oelrich v. Kent*, 407.

6. Case for jury—Negligence—Defective sidewalk—Flagstone—Roots of trees—Liability of property owner. *Campbell v. Vincent*, 419.

7. Case for jury—Negligence—Master and servant—Assumption of risk. *Lamb v. Penna. R. R. Co.*, 536.

8. Case for jury—Negligence—Master and servant—Defective scaffold—Fall of workman—Safe place to work—Employer's duty to inspect and repair—Delegation of duty—Foreman—Vice-principal—Obvious danger—Assumption of risk—Contributory negligence. *Swartz v. Bergendahl-Knight Co.*, 421.

9. Case for jury—Negligence—Master and servant—Electric company—Wires—Defective transformers—Notice—Death of lineman—Presumption of care—Contributory negligence—Conflicting facts. *Faulk v. Duquesne Light Co.*, 389.

10. Case for jury—Negligence—Master and servant—Mines and mining—Inexperienced minor—Striking unexploded charge with pick—Employer's duty to warn of danger—Instruction—Delegation—Custom—Fellow servant. *Jellic v. Jamison C. & C. Co.*, 447.

11. Case for jury—Negligence—Oil companies—Fires—Origin—Engines—Hot tube method—Dangerous machinery—Custom of business. *Ramage v. P. & R. Oil Co.*, 491.

12. Judgment for defendant n. o. v.—Negligence—Municipalities—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing of wire in mud with broom—Splashing of mud—Injury to eye—Proximate cause. *Braggeman v. York*, 94.

13. Railroads—Grade crossing—Negligence—Pedestrian—Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Absence of light on engine—Engine visible—Harmless error—Directed verdict for defendant. *Krona v. Pittsburgh, C., C. & St. L. Ry. Co.*, 443.

PROXIMATE CAUSE.

1. Minors under sixteen—Employment—Factory Act of April 29, 1909, P. L. 283—Violation—Duplicate lists—Posting of lists—Burden of proof—Exception—Negligence—Master and servant—Safe place to work. *Chabot v. Pittsburgh Plate Glass Co.*, 504.

2. Negligence—Municipalities—Accumulation of filth on street and sidewalk—Woman sweeping off sidewalk—Pushing

PROXIMATE CAUSE—continued.

*of wire in mud with broom—Splashing of mud—Injury to eye—Court and jury—Judgment for defendant n. o. v. **Brugge-man v. York**, 94.*

*3. Negligence—Oil companies—Fires—Origin—Engines—Hot tube method—Dangerous machinery—Custom of business—Case for jury. **Ramage v. P. & R. Oil Co.**, 491.*

PUBLIC OFFICERS.

*1. Councilmen—Disclosure of interest—Act of June 27, 1913, P. L. 568—Cities. **Com. v. Strickler**, 60.*

*2. County auditors—Audit—Failure to appeal—Sureties—Liability for defalcation of principal—Judgment for defendant—Municipalities—Official bonds—Default. **Snyder v. Berkey**, 489.*

3. Justices of the peace—County officers—Jurisdiction, C. P.—Quo warranto—District attorney.

Although a justice of the peace receives a commission from the governor, he is not a State, but a county officer; and his right to hold office may, therefore, be questioned in quo warranto proceedings by the district attorney of the county in which he claims the right to hold office. **Com. v. Cameron**, 209.

4. Justices of the peace—Jurisdiction—Place of residence—Act of February 22, 1802, 3 Smith's Laws 490.

Under the Act of February 22, 1802, 3 Smith's Laws 490, providing that no justice of the peace shall act as such, unless he shall reside within the limits of the district for which he was commissioned, a justice of the peace residing in that part of a township, which, after the justice was commissioned for the entire township, was annexed to a borough, ceases to have any legal right to exercise the office of justice of the peace. **Com. v. Cameron**, 209.

*5. Public Service Commission—Act of July 26, 1913, P. L. 1874—Street railways—Rates—Change of rates—Posting and publication. **Pittsburgh v. Pittsburgh Rys. Co., Jacoby v. Pittsburgh Rys. Co.**, 558.*

*6. Public Service Commission—Complaint—Street railways—Change of rates—Reasonableness—Boroughs—Contracts—Bill in equity—Dismissal—Findings of commission—Appeal—Practice and Jurisdiction, C. P.—Act of July 26, 1913, P. L. 1874. **St. Clair Boro. v. T. & P. Elec. Ry. Co.**, 462.*

7. Supervisors—Contracts—Municipal contracts—Townships of second class—Water supply—Estoppel—Act of May

PUBLIC OFFICERS—*continued.*

25, 1907, P. L. 231. **Trevorton Water Supply Co. v. Zerbo Twp.**, 31.

8. *Workmen's Compensation Board—Appeal to Common Pleas Court—Order remanding case to board—Erroneous order—Practice, C. P.—Practice, Supreme Court. Rakie v. Jefferson & Clearfield C. & I. Co.*, 534.

PUBLIC SERVICE COMMISSION, see Public Officers.

QUO WARRANTO.

1. *Cities—Councilmen—Disclosure of interest—Act of June 27, 1913, P. L. 568. Com. v. Strickler*, 60.

2. *Justices of the peace—County officers—Jurisdiction, C. P.—District attorney. Com. v. Cameron*, 209.

RAILROADS.

1. *Grade crossing—Absence of lights on engine—Engine visible—Negligence—Pedestrian—Deafness—Degree of care—Death—Presumption of care—Rebuttal of presumption—Contributory negligence—Evidence—Rebuttal—Harmless error—Directed verdict for defendant. Krenn v. Pittsburgh, C., C. & St. L. Ry. Co.*, 443.

2. *Laying of street railway tracks—Bill in equity—Injunction—Deeds—Building restrictions—Building line—Covenants—Construction—Intention—Restricted space—Lowering grade—Erection of poles. Dewar v. Carson*, 599.

3. *Locomotive whistle—Deafening of fireman on locomotive on next track—Negligence—Interstate commerce—Federal Employer's Liability Act—Fellow-servant rule—Failure to warn of blowing of whistle—Common knowledge—Evidence—Custom to warn—Admissibility. Royer v. Penna. R. R. Co.*, 438.

4. *Negligence—Automobiles—Contributory negligence—Guest—Testing danger. Vocca v. Penna. R. R. Co.*, 42.

5. *Negligence—Ejectment of passenger at dangerous place—Damages—Compensatory and exemplary damages—Pleadings—Statement of claim—Amendment—Departure—Measure of damages—Present worth—Instructions—Failure to request more specific instructions—Evidence—Res gestæ—Conversation—Rulings by trial judge—Questions considered on appeal. Leonard v. B. & O. R. R. Co.*, 51.

6. *Railroad company—Assumption of risk—Case for jury—Negligence—Master and servant. Lamb v. Penna. R. R. Co.*, 536.

RAILROADS—continued.

7. *Railroad crossings—Negligence—"Stop, look and listen"—Presumption—Contributory negligence—Burden of proof—Nonsuit—Evidence—Leading question. Waltoosh v. Penna. R. R. Co., 372.*

8. *Relief fund—Death benefits—Suit at law—Recovery—Satisfaction—Subsequent claim against relief fund—Affidavits of defense—Sufficiency—Act of Congress of April 22, 1908.*

A regulation of a relief association of a railroad company providing that the recovery of a judgment in a suit for damages on account of injury or death of a member shall preclude any claim upon the relief fund for benefits on account of such injury or death, is valid; and where a widow has recovered a judgment against the railroad company for the death of her husband she cannot thereafter assert a claim against the railroad relief fund, and an affidavit of defense setting up such regulation as a bar to such action is sufficient.

In such case the Act of Congress of April 22, 1908, 35 Statutes-at-large 65, c. 149, No. 5, providing that any "contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void," is not applicable, such act not intending that there should be both a payment of benefits and a recovery of damages for the injury, at least in so far as payments for both are to be made by the same defendant.

In such case, had plaintiff received payment of the benefit certificate prior to bringing suit for damages, the stipulation in the contract of membership in the relief fund could not have been permitted to defeat the right to recover damages, but defendant would have been entitled to set off the sum it had so paid the plaintiff. *Getkin v. Penna. R. R. Co., 150.*

9. *Street railways—Boroughs—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches—"Switches"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough—Laches—Acquiescence—Ratification—Bill in equity—Injunction. Pittsburgh Rys. Co. v. Carriack Boro., 333.*

10. *Street railways—Change of rates—Reasonableness—Boroughs—Contracts—Bill in equity—Dismissal—Findings of Public Service Commission—Appeal—Practice, C. P.—Act of July 26, 1913, P. L. 1374—Jurisdiction, C. P.—Public Service Commission—Complaint. St. Clair Boro. v. T. & P. Elec. Ry. Co., 462.*

RAILROADS—continued.

11. *Street railways—Rates—Change of rates—Posting and publication—Public Service Commission—Act of July 26, 1913, P. L. 1374.*

The posting and publishing of a schedule changing the rates of a railway company are a condition precedent to the taking effect of the changed rate, and where the schedule of change is not properly posted the Public Service Commission may restrain a railway from putting the rate into effect.

An order of the Public Service Commission, requiring a street railway company to desist from collecting an increased rate of fare, which the company undertook to establish by a schedule filed with the Public Service Commission, was properly affirmed by the Superior Court, where it appeared that copies of the new schedule were sent to the agents of the railway company at its offices and stations where the business of the company was transacted, with directions to keep a copy of the same on file with the copy of the schedule of fares for street car service on file at such stations, but where no copy of the schedule was posted in the rooms to which the public had access, as required by Section 1 of Article II of the Public Service Company Law. **Pittsburgh v. Pittsburgh Rys. Co., Jacoby v. Pittsburgh Rys. Co., 558.**

REAL ESTATE.

1. *Appropriation of land—Parks—Eminent domain—Boroughs—Act of May 14, 1915, P. L. 312-412—Indebtedness in excess of statutory limit—Failure to submit to vote of people—Failure to pay—Mandamus—Courts—Power over process. Vickroy v. Ferndale Boro., 321.*

2. *Contract for sale of real estate—Specific performance—Laches—Failure to make tender—Refusal—Equity. Kutz's Estate, 548.*

3. *Deeds—Building restrictions—"Single dwelling house" on each lot—Erection of duplex building or apartment house—Bill in equity—Dismissal.*

Covenants restraining a man in the free enjoyment of his property are not to be extended by implication.

The building of a duplex building or apartment house is not a violation of a restriction limiting the owner to one dwelling house upon a lot, the test being whether the building is a single structure intended for dwelling purposes and not whether it was intended to house more than one family.

Where the conveyance of a lot of ground from defendant to plaintiff contained a building restriction that but "a single

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dwelling house" should be erected on the lot, and also a covenant that like restrictions should be imposed in any other conveyance of property made by the defendant in the district mentioned, and thereafter conveyances of other lots were made by defendant with the provision that the restriction should not be construed to prohibit the erection of a duplex dwelling or apartment house, plaintiff's bill in equity for the enforcement of the building restrictions, on the ground that a duplex dwelling or apartment house was not "a single dwelling house" within the meaning of the covenant of his deed, was properly dismissed. **Rohrer v. Trafford Real Estate Co.**, 297.

4. *Deeds—Recording of—Priority—Acts of March 18, 1775, 1 Smith's Laws 442, Sec. 1; May 19, 1893, P. L. 108—Construction.*

The Act of May 19, 1893, P. L. 108, amending the Act of March 18, 1775, 1 Smith's Laws 422, carefully and deliberately changed the law relating to the recording of deeds and conveyances, and now all deeds and conveyances made and executed within this Commonwealth are required to be recorded within ninety days after execution, and every deed or conveyance not recorded within that time is fraudulently and void as to subsequent purchasers or mortgagees.

The owners of certain real estate delivered an agreement for the sale thereof on December 11, 1916. The agreement was recorded on March 26, 1917, one hundred and five days after its delivery. On February 26, 1917, the owner of the said land delivered a deed therefor to another party, for a valuable consideration, in pursuance of an agreement made by them on January 15, 1917. Said deed was recorded on April 23, 1917, 56 days after the date of its delivery. On a case stated, brought by the grantee in said deed to determine the validity thereof, the lower court held that the failure of the first purchaser to place his agreement on record within ninety days after its execution, as required by the Act of 1893, rendered his title void as against the plaintiff, and entered judgment for the plaintiff. *Held*, no error.

Davey v. Ruffell, 162 Pa. 443, criticised as to dicta in the opinion. **Smith v. Young**, 367.

5. *Estates tail—Act of April 27, 1855, P. L. 368—Construction—Intention—Wills and devises.* **Cross v. Dye**, 207.

6. *Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 13, 1836, P. L. 563; March 17, 1856, P. L. 338; April 6, 1859, P. L. 339;*

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April 3, 1903, P. L. 139, and June 5, 1915, P. L. 847—Equity Rule 10—Construction of dam—Overflowing of waters—Dam partly in another county—Bill by riparian owner—Relief affecting entire dam—Relief in personam. Vandersloot v. Peana. W. & P. Co., 99.

7. Merger—Dower interest—Assignment of dower interest to owner in fee—Mortgages—Assumpsit for dower.

When ever a greater estate and a less meet in the same person, the less is merged or drowned on the greater,

Merger is a question of intent and will not take place against the wishes of the party to be affected by it, and where it is against the interest of the person holding the respective titles, the law will not presume an intent to merge.

Where the owner of a land, subject to dower and also to a mortgage to secure the payment of the dower interest, subsequently acquired the dower interest, and thereafter conveyed the premises subject to the mortgage as part of the consideration money, a merger of the dower and the fee took place, and the personal representative of such grantor could not maintain an action of assumpsit for the dower against the grantee of the land, although the amount due was not in dispute; in such case the plaintiff's remedy was upon the mortgage. *Griffith v. McKeever*, 605.

8. Minerals—Owner of land only—Partition.

One who has parted with all his right, title and interest in a vein of coal underlying land in which he still has an interest has no standing to maintain a partition proceeding instituted for the partition of the entire tract including the coal. *Young's Estate*, 206.

9. Rule to bring ejectment—Party in possession—Evidence—Jurisdictional facts—Title—Will—Possession—Payment of rent—Act of June 10, 1893, P. L. 415—Real property. Bell's Petition, 495.

10. Wills—Rule in Shelley's Case—Act of April 27, 1855, P. L. 368—Trusts—Dry trusts. Mylin v. Hurst, 77.

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1. Legal effect of—Explanation—Admission in pleadings. Pittsburgh Block Coal Co. v. Oliver Coal Co., 290.

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1. Corporations—Appointment—Hostile interest—Removal.

The receiver of a railroad company was properly removed on petition of creditors of the company where it appeared that he

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was interested in another railroad with which the former company was engaged in litigation. **Com. v. North Shore R. R. Co.**, 155.

2. *Corporations—Payments—Losses—Issue of unauthorized certificates—Surcharge—Payments directed by order of court—Subsequent order—Priority.* **Penna. Eng. Works v. New Castle Stamp. Co.**, 378.

3. *Equity practice—Injunction—Bond—Affidavit—Protection of property—Acts of March 21, 1806, 4 Sm. L. 326; May 6, 1844, P. L. 564, Sec. 1, and June 16, 1838, P. L. 784—Equity Rules 81 and 82.* **Baur v. Wilkes-Barre Light Co.**, 115.

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1. *County auditors—Finality of report—Failure to appeal—Sureties—Liability for defalcation of principal.* **Snyder v. Berkey**, 489.

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3. *Judgments—Judgment notes—Alleged alteration—Addition of seal—Evidence—Burden of proof—Presumption—Opening judgments—Discretion of court—Rule to strike off judgment—Laches.* **Bowman v. Berkey**, 327.

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2. *Negligence—Railroads—Evidence—Conversation—Rulings by trial judge—Questions considered on appeal.* **Leonard v. B. & O. R. R. Co.**, 51.

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1. *Bill by riparian owner—Relief affecting entire dam—Relief in personam—Equity jurisdiction—Injury to real estate within county—Foreign defendant—Leave to serve outside of county—Acts of June 13, 1836, P. L. 568; March 17, 1856, P. L. 388; April 6, 1859, P. L. 389; April 3, 1903 P. L. 139, and June 5, 1915, P. L. 847—Equity Rule 10—Construction of dam—Overflowing of waters—Dam partly in another county.* **Vandersloot v. Penna. W. & P. Co.**, 99.

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1. *Contracts in writing—Purchase-price—Agreement as to purchase-price—Insufficiency—Plaintiff's statement—Quantum meruit. Aland v. Cluett, Peabody & Co., 364.*

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A cardinal rule in the interpretation of statutes of set-off, requires that there be mutuality of demand; both as regards the quality of the right and identity of the party; by mutuality in quality of right is to be understood mutuality of right with respect to the legal remedy provided for the enforcement of the several demands.

In an action by the receiver of a bank brought against the maker of promissory notes held by the bank, the defendant cannot set-off against the plaintiff's demand, bank deposits made by him in a fiduciary capacity, prior to the insolvency of the bank, since to permit such a set-off would allow the defendant to pay his own debts with money belonging to others. *Hunter v. Henning, 347.*

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To remove the bar of the statute of limitations, the promise to pay must refer distinctly and specifically to the original debt.

Where a person is indebted to another on several distinct obligations, one of which is barred by the statute of limitations, and thereafter the debtor makes a payment, the application of the whole or a part of such payment to the barred claim, without the knowledge or consent of the debtor, cannot operate to toll the statute as to such claim.

A claim against a decedent's estate was properly disallowed where it was based on an oral promise by decedent in 1904, since which time a greater period than the statutory limitation of six years had elapsed without decedent having renewed his promise to pay, or having paid any interest thereon, and, although it was contended that decedent had made a payment on account after the claim had been barred, it appeared that decedent was indebted to claimant on several other obligations, not barred by the statute, and made a payment to claimant, part of which claimant applied to the barred claim without the knowledge or consent of deceased. *Montgomery's Estate, 412.*

2. *Criminal law—Misdemeanors—Flight—Return—Concealment within state—Act of March 31, 1860, P. L. 427-450, Sec. 77—"Usual resident"—Words and phrases—Tolling of statute—Seduction—Promise to marry—Evidence—Sufficiency—Charge—Case for jury. Com. v. Weber, 592.*

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3. *Amendatory acts—Construction—Intention.*

A statute, amendatory of another, declaring that the former shall read in a particular way, must, in general, be held to repeal all provisions not retained in the altered form. All matters not incorporated into the amendment, the latter must be held to have repealed. *Smith v. Young, 367.*

4. *Beneficial associations—Insurance companies—Distinction—By-laws of society—Failure to include by-laws in certificate—Acts of May 11, 1881, P. L. 20, and April 6, 1893, P. L. 7. Lafferty v. Supreme Council Cath. Mut. Ben. Assn., 452.*

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Where the taking of water by a water company is mainly for the purpose of supplying citizens within the proper territorial limits of the company, the furnishing of a small supply to persons outside of the limits is a mere incident of the main purpose and the taking will not be enjoined.

A water company has the right to condemn as much water as is reasonably necessary, not only for present purposes, but for future needs.

A water company incorporated by a special act for the purpose of supplying water to five boroughs named and the vicinity thereof, did not lose its charter rights, at the adoption of the Constitution of 1873, or by its acceptance of the Corporation Act of April 29, 1874, P. L. 73, and where the boroughs were subsequently consolidated into a city, the corporation did not exceed its charter rights by supplying water in the vicinity of such city, where it did so merely as an incident to the business of supplying water to the city.

WATER AND WATER COMPANIES—*continued.*

Where the true purpose of condemnation of water by a water company is to furnish a territory beyond the original charter limits, such question can be inquired into only by the Commonwealth upon an appropriate proceeding, but not by a bill in equity under the Act of June 19, 1871, P. L. 1360, at the instance of a private person; and a bill in equity alleging such purpose and seeking to enjoin such taking was properly dismissed. **Croyle v. Johnstown Water Co.**, 484.

WILLS.

1. *Construction—Definite failure of issue—Life estate—Remainders—"Lawful heirs"—Ejectment—Act of April 27, 1855, P. L. 368.*

A limitation over by will to persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue.

Testator, by will, provided, "I give to my son. . . . the farm on which I now live. . . . and if he should not have any lawful heirs, then after his death, the farm to be sold and divided equally between" six of testator's grandchildren. The son had two children both of whom predeceased him. He devised the farm to his widow in fee, and after his death testator's administrator d. b. n. c. t. a. brought an action of ejectment therefore. *Held*, (1) the first taker took only a life estate, and (2) the gift over to the grandchildren was good, and a verdict was properly directed for the plaintiff.

In such case there was no merit in the contention that the first taker took an estate tail, enlarged by Act of April 27, 1855, P. L. 368, into a fee simple. **McClintic v. McClintic**, 112.

2. *Construction—Devises—Gift in fee—Defeasible gift—Intention.*

Testator devised his residuary estate, including certain realty, to "my two children (naming them) their heirs and assigns, share and share alike, or each to have one-half. . . . In case of the death of either child during minority, without issue, then the share of such child dying without issue shall go to and be vested in such surviving child." The will then provided for a gift over to certain named devisees in case of the death of both children without issue. *Held*, that each of the testator's two children took a fee simply estate in one-half of said real estate, defeasible only by death without issue during

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minority and indefeasible on arrival at the age of twenty-one. **Naugle v. Irvin**, 214.

3. *Construction—Gift to class—Vested and contingent remainders—"Surviving"—"Survivors"—Time for determination of class—Equality of distribution—Avoiding intestacy.*

It is a general rule of construction that the word "survivor" or "surviving" following a prior gift is understood as referring to the death of the testator, unless a contrary intention is apparent.

Where a testator directed that the proceeds of his real estate, in which he devised a life interest to a named devisee, should "be equally divided among the surviving devisees named in this will or their legal representatives," he intended that the recipients of his bounty should be the devisees who were living at the time of his own death, and did not restrict the class to those who should survive the life tenant.

In such case, the reasonable interpretation of the words "surviving devisees or their legal representatives," is to refer the word "surviving" to testator's death and to construe "or their legal representatives" (whether meaning executors and administrators, heirs or next of kin) as intended to prevent the lapse of the share of any legatee who might die before the time for distribution should arise.

This interpretation avoids intestacy and secures equality of distribution among the legatees. **Petrow's Estate**, 89.

4. *Construction—Legacies—Charitable bequests—Identification of legatee.*

A testatrix made her will in 1909, whereby she bequeathed one-fourth of the residue of her estate to the "Allegheny County Children's Aid Society, of Allegheny County, Pennsylvania." The testatrix died in March, 1915. At the time of the making of the will there was in Allegheny County an unincorporated body known as the Children's Aid Society of Allegheny County. In May, 1913, the majority of the members of such society voted to incorporate the society, and in June, 1913, such society was incorporated by the Common Pleas Court. Thereafter certain persons who had been members of the unincorporated body, not approving of the incorporation, formed an organization known as the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary. Each of such organizations claimed the legacy. *Held*, the court properly awarded the legacy to the incorporated body. **Neel's Estate**, 190.

WILLS—*continued.*5. *Construction—Life estates—Remainders—Revocation of bequest for life—Effect on interest in remainder.*

Testatrix bequeathed her residuary estate in trust to pay the income equally to three legatees for life, and provided that upon their respective deaths the principal represented by their respective shares of income should be paid to the child or children of such deceased legatee. By codicil testatrix revoked the bequest to one of the three persons named. *Held*, such revocation did not affect the gift in remainder to the children of such legatee, but created an intestacy as to the income which such legatee would have received for life had the bequest not been revoked. *May's Estate*, 115.

6. *Construction—Rule against perpetuities—Accumulations—Act of April 18, 1853, P. L. 503—Intention.*

Testatrix devised three-fourths of her residuary estate in trust, directing that the income be given to her three sons for life, and providing that upon the death of any of such sons the one-third part theretofore paid to such deceased son should be equally divided among his children and that the principal of such third should be divided among such children upon their arriving at the age of twenty-five years. The will then provided, "upon any of my sons dying without children or the issue thereof living, then I direct my said trustee to pay such interest as they would have received hereunder, to the children of my other sons per capita, upon their arriving at the age of twenty-five years." The eldest son of the testatrix died after the testatrix without issue; and a daughter of the testatrix claimed that the gift over to the children of surviving sons of the testatrix was void as an accumulation and was violative of the rule against perpetuities. *Held*, (1) the testatrix intended that the one-third of the trust estate, the income of which was paid to the deceased son of the testatrix during his life, should on the death of such son vest in the children of her surviving sons as a class immediately upon the death of such deceased son, and (2) that the will did not violate the rule against perpetuities or the statute against accumulations. *McKeown's Estate*, 216.

7. *Devises—Real estate—Estates tail—Act of April 27, 1855, P. L. 368—Construction—Intention.*

A testatrix having given her husband an interest for life in certain real estate, gave the remainder to "my daughter, Marietta R. Cross, and my son, Walter L. Cross, and the survivors of them and their heirs in fee, but should they both die without lawful issue, then the same shall go to my sons, Jesse and Wil-

WILLS—continued.

bur, and their heirs." Walter L. Cross died unmarried and without issue prior to testatrix, but Marietta R. Cross survived the testatrix and the life tenant and aliened the property. In an action by Jesse and Wilbur against the grantee of Marietta R. Cross, brought after the death of Marietta, the court held that Marietta had received an estate tail which became a fee simple estate under the Act of April 27, 1855, P. L. 368, and directed a verdict for defendant. *Held*, no error. **Cross v. Dye**, 207.

8. *Election to take against will—Exemption—Act of April 1, 1909, P. L. 87—Appraisal—Exemption in cash.* **Hollinger's Estate**, 72.

9. *Election to take against will—Share of husband—Lapsed legacies.* **Hollinger's Estate**, 75.

10. *Joint will—Surcharge—Failure to file account—Commissions—Executors and administrators.* **Springer's Estate**, 46.

11. *Real estate—Rule in Shelley's Case—Act of April 27, 1855, P. L. 368—Trusts—Dry trusts.*

Testator devised to his grandson a farm and wood lot "for and during the term of his natural life and after his death unto his lawful issue and in case he has no lawful issue, then unto his next of kin, in fee." He further named a trustee for the estate given to his grandson and directed the trustee "to keep properly insured and in good order and repair all buildings" on the property. No funds were provided for insurance or repairs. *Held*, that the trust was dry and passive and not sufficient to prevent the operation of the rule in Shelley's Case, and that the grandson took an estate tail, which was enlarged by the Act of April 27, 1855, P. L. 368, into a fee. **Mylin v. Hurst**, 77.

12. *Validity—Alleged alteration—Handwriting experts—Absence of corroboration—Weight—Petition for issue d. v. n.—Refusal.*

After direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration, but the evidence of experts, without the support of other evidence, is insufficient to attack the validity of a document.

Where a petition for an issue devisavit vel non alleged that the last paragraph of the will had been added thereto after the execution thereof by testator and without his knowledge or consent, but where the scrivener of the will testified that he wrote the entire will with the exception of the signature of the testator and the witnesses, in the presence of the testator and the subscribing witnesses, and where the only evidence in be-

WILLS—continued.

half of the contestants was that of handwriting experts, who testified that the paragraph in controversy was not in their opinion written with the same pen and ink as the other portions of the will, the court made no error in dismissing the petition. **McWilliams' Estate**, 526.

WORDS AND PHRASES.

1. "*Carriage cases*" distinguished—Negligence—Master and servant—Cab company—Hire of team and driver—Driver assisting hirer's work—Special and general employment—Negligence of driver—Injury to hirer's employee—Action against cab company—Respondeat superior. **Pahlman v. Excelsior Express and Standard Cab Co.**, 393.

2. "*Lawful heirs*"—Wills—Construction—Definite failure of issue—Life estate—Remainders. **McClintic v. McClintic**, 112.

3. "*Single dwelling house*" on each lot—Real estate—Deeds—Building restrictions—Erection of duplex building or apartment house—Bill in equity—Dismissal. **Rohrer v. Trafford Real Estate Co.**, 297.

4. "*Stop, look and listen*"—Negligence—Railroad crossings—Presumption—Contributory negligence—Burden of proof—Nonsuit—Evidence—Leading question. **Walton v. Penna. R. R. Co.**, 372.

5. "*Surviving*" and "*survivors*" in wills. **Petrow's Estate**, 89.

6. "*Switches*"—Subsequent incorporation of borough—Construction of tracks into new car barn—Interference by borough—Laches—Bill in equity—Injunction—Boroughs—Street railways—Townships—Grant of right to operate road—Resolution—Minutes of meeting—Right to construct sidings and switches. **Pittsburgh Ry. Co. v. Carrick Boro.**, 333.

7. "*Usual resident*"—Criminal law—Statute of limitations—Misdemeanors—Flight—Return—Concealment within State—Act of March 31, 1880, P. L. 427-450, Sec. 77—Tolling of statute—Seduction—Promise to marry—Evidence—Sufficiency—Charge—Case for jury. **Com. v. Weber**, 592.

WORKMEN'S COMPENSATION BOARD, see **Public Officers**.

WORKMEN'S COMPENSATION LAW.

1. Award by Workmen's Compensation Board—Appeal to Common Pleas Court—Order remanding case to board—Er-

WORKMEN'S COMPENSATION LAW—continued.

aneous order—Practice, C. P.—Practice, Supreme Court—Interlocutory order.

On appeal to the Common Pleas from a decision of the Workmen's Compensation Board, affirming the finding of a referee in favor of a claimant, the court should enter a final judgment awarding to each dependent the amount due him; and where the court remands the case to the Workmen's Compensation Board for adjustment in accordance with the court's opinion, the Supreme Court, on appeal, will remand the record to the Common Pleas with directions to enter a final judgment. **Rakie v. Jefferson & Clearfield C. & I. Co.**, 534.

2. *Injury in course of employment—Interval of leisure while awaiting material—Lighting cigaret—Clothes catching afire—Death—Award—Act of June 3, 1915, P. L. 736.*

In order to hold an employer liable under the Workmen's Compensation Law of 1915 it is not necessary to show that the injury arose out of the employment. It is sufficient if it occurred in the course of employment, except for injuries intentionally self-inflicted, or caused by an act of a third person intended to injure the workman for reasons personal to him.

An employer is liable for compensation for an injury sustained by a workman during a short interval in his work while awaiting the arrival of material with which to work.

Acts of ministration by a servant to himself, such as quenching his thirst, satisfying his hunger, and protecting himself from excessive cold, the performance of which while at work are reasonably necessary to his health and comfort, are incident to his employment and acts of service therein within the workmen's compensation acts, although they are only indirectly conducive to the purpose of the employment.

An employment is not broken by mere intervals of leisure such as those taken for a meal and if an accident occurs to a workman during such time the employer is liable even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something that is wholly foreign to his employment.

It is not unreasonable for workmen to smoke out of doors, during intervals in their work, where it does not interfere with their duties.

Where an employee, during an intermission in his work, while waiting for material, struck a match for the purpose of lighting a cigaret and as a result his clothing, saturated with oil, by reason of the work in which he was engaged, caught on

WORKMEN'S COMPENSATION LAW—*continued.*

fire and he was fatally burned, an award of compensation to his dependents was properly made. *Dzikowska v. Superior Steel Co.*, 578.

WRITTEN CONTRACTS, see Contracts.

*Ex. J. A. P.
27/6/18*



